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Nos. 30, 31, 32

In the Supreme Court of the United States

OCTOBER TERM, 1941

DANIEL D. GLASSER, PETITIONER

v.

UNITED STATES OF AMERICA

NORTON I. KRETSKE, PETITIONER

v.

UNITED STATES OF AMERICA

ALFRED E. ROTH, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 1117–1139) is reported in 116 F. (2d) 690.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered December 13, 1940 (R. 1139–1140), and petitions for rehearing (R. 1141–1208) were denied January 23, 1941 (R. 1239). The petitions for writs of certiorari were filed February 28, 1941, and were granted April 7, 1941 (R. 1245). The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rule XI of the Rules of Practice and Procedure in Criminal Cases promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

1. Whether there is substantial evidence to support the convictions of petitioners Glasser and Roth.

2. Whether the record fails to disclose that the indictment was returned in open court by the grand jury.

3. Whether the trial court erred in overruling petitioners' motion to quash the indictment on the ground that the grand jury was illegally constituted because of the exclusion of women therefrom.

4. Whether the second count of the indictment sufficiently charged a conspiracy to defraud the United States.

5. Whether the trial court abused its discretion in denying petitioners' motion for a new trial

based on the alleged improper method of selecting prospective petit jurors.

6. Whether petitioner Glasser was deprived of his right to the effective assistance of counsel.

7. Whether Government Exhibits 81A and 113 were properly admitted in evidence.

8. Whether the conduct of the trial judge was such as to deprive petitioners of their right to a fair and impartial trial.

9. Whether the prosecutor was guilty of prejudicial misconduct.

STATUTE INVOLVED

Section 37 of the Criminal Code (U. S. C., Title 18, Sec. 88) reads:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both.

STATEMENT

On September 29, 1939, an indictment in two counts was returned against petitioners and two others[1] in the district court for the northern district of Illinois (R. 2–38). The first count is not

[1] The two co-defendants, Anthony Horton and Louis Kaplan, were convicted (R. 101, 1045), but did not appeal.

here involved since it was dismissed at the close of the Government's case upon its election to proceed on the second count (R. 100). The second count (R. 22–37), after alleging that during certain periods the defendants Glasser and Kretske were assistant United States attorneys for the northern district of Illinois, employed to prosecute in that district all delinquents for crimes and offenses cognizable under the authority of the United States, particularly violations of the federal internal revenue laws relating to liquor, charged in substance that the defendants conspired to defraud the United States of its governmental function to be honestly, faithfully, and dutifully represented in such matters in the courts of the United States by an assistant United States attorney free from corruption, improper influence, dishonesty, or fraud. The count alleged broadly that the conspiracy was to be accomplished by the soliciting of moneys from certain persons charged with violating or about to be charged with violating the federal liquor laws, which moneys were to be used to influence and corrupt the defendants Glasser and Kretske and the defendant Glasser alone in the performance of their and his official duties.

Petitioner Glasser was the assistant United States attorney in charge of liquor cases (R. 188, 914, 917) in the office of the United States Attorney for the northern district of Illinois from shortly after March 1935 (R. 186, 911) until April

1939 (R. 912). Petitioner Kretske was also an assistant United States attorney in that office from October 1934 (R. 186–187, 802) until April 1937 (R. 187, 801) and assisted Glasser in the prosecution of liquor cases (R. 188, 190, 801). After his resignation from office, Kretske practiced law in Chicago (R. 753, 803). Petitioner Roth was an attorney in private practice (R. 833) to whom Kretske referred various persons who were charged with violations of the liquor laws and whose cases were involved in the instant conspiracy (R. 835, 861, 872, 875, 878). The defendant Horton was a bondsman who conducted his business in the Federal Building in Chicago where the office of the United States Attorney is located (R. 750, 765–766). The defendant Kaplan was engaged generally in the illicit alcohol business in and around Chicago and was a large scale operator of illicit stills in that vicinity (R. 452, 453, 460, 463, 467–468, 473, 530).

The other relevant facts relating to the questions in issue are set out in full in the pertinent portions of the Argument.

Petitioners were convicted (R. 101, 1045) and were sentenced as follows: Glasser and Kretske to imprisonment for a period of 14 months and Roth to pay a fine of $500 (R. 104). On appeal to the Circuit Court of Appeals for the Seventh Circuit the petitioners' convictions were affirmed (R. 1117–1140).

SUMMARY OF ARGUMENT

I. While it is not our contention that the evidence precluded a verdict of innocence, or that it compelled a conviction, the evidence, which is summarized in the Argument and detailed at greater length in the appendix, is sufficient to support the convictions of petitioners Glasser and Roth. The questions concerning the guilt of petitioners Glasser and Roth depend upon a development and collocation of circumstances tending to sustain the inferences necessary to support the verdict. No single case or incident points inevitably to the guilt at least of Glasser, but there is substantial evidence to show that violators of the alcohol tax laws conferred with the defendant Horton or the petitioner Kretske concerning the possibilities of a favorable disposition of the pending case. The evidence further shows that money was paid to Kretske to fix the case and that Kretske, in accepting the money, stated that it was to go to Glasser. Thereafter, except where payment had been refused, or where it was apparent that Glasser found it impossible to act, the case on behalf of the Government was not pressed by Glasser. In addition, there was direct evidence of the participation of Roth and Glasser in the conspiracy. The issue of the guilt of Glasser and Roth is largely an issue of credibility and was therefore peculiarly within the province and competence of the jury. There was sufficient

evidence to permit the jury to resolve the issue and to justify the jury's conclusion.

II. The record shows that the indictment was returned in open court by the grand jury. The endorsement on the face of the indictment, "Filed in open court this 29th day of Sept., A. D. 1939, Hoyt King, Clerk," preceded by the notation, "A true bill, George A. Hancock, Foreman," is a sufficient record showing. *Ledbetter* v. *United States*, 108 Fed. 52, 55. In addition, however, there is also a notation of record that "The Grand Jury return 4 Indictments in open Court." Even if, as petitioners urge, this notation should be considered invalid as a *nunc pro tunc* order, such invalidity is immaterial as involving merely a matter of form which petitioners do not contend prejudiced them. U. S. C., Title 18, Section 556. Nor is it contended that the indictment was not in fact returned in open court by the grand jury.

III. There was no impropriety in excluding women from the grand jury list because it was not shown that women had at that time been placed on the state jury lists pursuant to the recently enacted Illinois statutes. Further, petitioners have not shown that they were prejudiced in any way or that any of the grand jurors were incompetent or disqualified.

IV. Count two of the indictment is not fatally defective as alleging a conspiracy to commit the substantive offense of bribery or as being vague,

indefinite, or uncertain. The count clearly charges a conspiracy to defraud the United States, the scheme of resorting to bribery being averred only as a means of consummating the conspiracy to defraud. *United States* v. *Manton*, 107 F. (2d) 834 (C. C. A. 2), certiorari denied, 309 U. S. 664. It is sufficient that the object of the conspiracy is alleged with "certainty to a common intent"; the failure to allege the details of each transaction executed by the defendants in furtherance of that object does not open the count to attack on demurrer, for the conspiracy is the gist of the charge and it may be assumed that the particulars of each such transaction, such as times, persons, causes, proceedings, circumstances, questions, and the like, were not determined at the time of the conspiracy. *Williamson* v. *United States*, 207 U. S. 425. These details were furnished petitioners in a bill of particulars, but the fact that the count could be made more certain by such a motion has no bearing on the sufficiency of the count on demurrer. *Hagner* v. *United States*, 285 U. S. 427, 431.

V. Petitioners have not shown abuse of discretion by the trial court in overruling their motion for a new trial based on the ground of improper selection of the petit jury. Not only is there no evidence that women, who were not members of the League of Women Voters, were excluded or that any women on the panel attended classes where

views of the prosecutor were presented, but the Bar Association Journal article upon which petitioners' affidavits rely negates their contentions. Petitioners' claim that the court clerk and jury commissioner improperly delegated their authority to select jurors is not substantiated. Moreover, even if there were a technical irregularity in selecting the prospective female jurors, petitioners have no standing to complain, since there is no showing of prejudice.

VI. Petitioner Glasser was not deprived by the trial court of his right to the effective assistance of counsel. The court offered the suggestion that Glasser's attorney accept an appointment to represent petitioner Kretske also, but Glasser objected and the suggestion was abandoned. Thereafter, at the request of Kretske, and with the express consent of the attorney and, at least, the tacit consent of Glasser, the court made the appointment. Nor was Glasser prejudiced by the fact that his attorney also represented Kretske. The attorney actively defended Glasser's interests throughout and, in fact, took the leading defense role at the trial.

VII. Exhibits 81A and 113, reports of the Alcohol Tax Unit in two of the cases in which the Government alleged that the official decisions of Glasser were influenced pursuant to the conspiracy charged in the indictment, were admitted only against petitioner Glasser and with the consent and agreement

of his counsel. Moreover, since they showed what evidence of violations of the alcohol tax laws was furnished to Glasser, they were directly relevant evidence.

VIII. There was no impropriety in the conduct of the trial judge. The incidents cited by petitioners do not support their claim of misconduct. The record shows that the actions of the court complained of were properly designed to elicit the truth and a full disclosure of material facts.

IX. Petitioners' contentions that the prosecuting attorney denied petitioner Glasser access to documents introduced in evidence, surreptitiously submitted to the jury pre-trial statements of Government witnesses, read to the jury only part of a witness's testimony before a grand jury, asked witnesses specious questions based upon unproved facts, and, after trial, lost certain defense exhibits, are not supported by the record. Though one of the prosecutors, after trial, entered official notations on a file envelope which had been introduced, these notations clearly did not prejudice Glasser's appeal. In respect of the claim that the prosecutor, by leading questions, assumed the role of a witness, the record shows that in many of the instances cited no objections were made and that in the others the questions were properly permitted.

ARGUMENT

I

THERE IS SUBSTANTIAL EVIDENCE WHICH SUPPORTS THE VERDICTS AGAINST GLASSER AND ROTH

Petitioners Glasser (Br. 72–78) and Roth (Br. 50–56) urge that the evidence was insufficient to support the verdict. Petitioner Kretske concedes (Pet. 3, Br. 3–4, 8–11) the existence of sufficient evidence against him.

Some preliminary observations are necessary in order that this branch of the case be placed in its proper setting. The gist of the evidence by which the Government, at the trial, sought to prove the guilt of petitioners, falls into two categories: (1) the circumstantial evidence relating to specific cases, in Glasser's charge, which were disposed of adversely to the Government; and (2) direct evidence of the improper actions of defendants Glasser, Kretske, Roth, Horton, and Kaplan. Together, the evidence in these two categories presents a pattern which shows these steps: (1) apprehension of violators and investigation of the specific cases by the Alcohol Tax Unit; (2) presentation of the material uncovered by the Unit to Glasser; (3) concurrent action by Kaplan or Kretske, directly, or through Horton, to solicit money from the prospective defendants upon the promise that the case would be settled satisfactorily to such prospective defendants,[1] such settle-

[1] It was at this point that Roth played his role: Kretske often referred the prospective defendants to Roth.

ment to be obtained by transmission of the money to Glasser; and (4) the disposition of the case, handled by Glasser, in the manner promised by Kretske, Kaplan, and Horton.

It is not our contention that the evidence precluded a verdict of innocence, or that it compelled a conviction. The case, we concede, depends in large part, at least in respect of Glasser, upon a development and collocation of circumstances tending to sustain the inferences necessary to support the verdict. It depends, too, in a considerable measure, upon the testimony of convicted bootleggers, of co-conspirators, of persons of dubious character.[2] But indeed, in a case such as this, it could scarcely be otherwise. Cf. *United States* v. *Manton*, 107 F. (2d) 834, 843 (C. C. A. 2), certiorari denied, 309 U. S. 664.

The instant issue also depends upon evidence relating to a number of cases handled by Glasser, and these specific cases carry with them varying degrees of persuasiveness. For some, there appears, indeed, to be satisfactory explanation;[3] for some, convincing explanation is wholly lacking. Petitioners Roth (Br. 50–56) and Glasser (Br. 72–78) have pitched their contentions relating to the sufficiency of the evidence upon only a few

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[2] There is also evidence of friction, during the period in question, between the Alcohol Tax Unit, some of whose investigators testified for the Government in the instant case, and Glasser (R. 583–585, 897–899, 905, 932–933, 948).

[3] The 118th Place still case, *infra*, pp. 16–17, seems to fall within this category.

isolated and specific cases involved in the conspiracy alleged. The resulting impression is distorted. We believe that a different impression is to be gained by examination of all the specific cases.

Justice both to the defendants and to the Government requires an extensive recitation of the evidence. We regret setting out at such length the relevant material. But we urge the necessity of doing so in order that the proper picture may be delineated accurately. In the appendix, *infra*, pp. 98–152, therefore, we shall include a narrative of the many cases and incidents involved. In this portion of the brief we shall summarize these cases and incidents. We submit that, observing the stricture that issues of the weight of the evidence and the credibility of the witnesses are within the exclusive province of the jury, the conclusion is justified that, upon the whole record, the verdict of the jury is supported by substantial evidence.

The Hodorowicz brothers cases.—The Hodorowicz brothers, Frank, Peter, Mike, and Anthony, together with Elmer Swanson, Christ Del Rocco, and others, comprised a notorious group of bootleggers operating in Chicago (R. 390, 735, 799, 891, 907). Frank Hodorowicz was the manager and financial agent of this group (R. 255–256, 260, 271, 296–298, 304–305, 307–308); his hardware store was its headquarters (R. 228–229, 244, 296, 298, 357–358).

The activities of the Hodorowicz group gave rise to the following cases involved in the present case: The 119th Street still, the Peter Hodorowicz-Walter Hort case, the Walter Hort case, the Zarrattini case, the Clem Dowiat case, the 118th Place still, the Stony Island Avenue still, and the general investigation of the Hodorowicz group. The circumstances of each of these cases are set out in the appendix.

In brief, the evidence relating to these cases shows that members of the Hodorowicz crowd were apprehended by investigators of the Alcohol Tax Unit in circumstances clearly indicating violations of the law. (R. 249, 254–255, 267–268, 277–278, 281, 282, 305, 355–356, 357–361, 384–385, 386, 387–389, 706.) [4] Immediately upon being apprehended the members of the group, directly or through other members, got in touch with Horton, a defendant below, Kretske,[5] or, in two cases, Miller, a

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[4] Thus, for example, Peter Hodorowicz and Walter Hort were arrested after selling illicit alcohol to an Alcohol Tax Unit investigator (R. 254–255, 265–266, 357–361). Walter Hort was arrested while driving a car containing illicit alcohol (R. 267–268). Albina Zarrattini was apprehended with illicit alcohol in her possession (R. 304–305). Clem Dowiat was arrested while hauling illicit alcohol (R. 355–366).

[5] In one case, involving the Stony Island Avenue still, Kretske, after offering to "take care" of the case for $1,200, referred the members of the group to Roth (R. 229–230, 244, 272–273, 297–298, 344–345).

bootlegger.[6] There followed negotiations between those apprehended, or persons in the Hodorowicz group acting in their behalf, and Kretske and Horton. In the 119th Street still case, Horton offered to "take care" of the matter for $500, which he said he would give to "Red", meaning Glasser. Del Rocco paid Horton the money. (R. 225–226, 230, 242–243.) In the Peter Hodorowicz-Hort case, Frank Hodorowicz paid Miller $800 to have the case against Hort and Peter "dragged along," and later Frank paid Miller $500 to "take care" of a second case involving Hort (R. 307–309). After the seizure of the 118th Place still, Frank Hodorowicz paid Kretske $800 upon the latter's assurance that he could take care of the matter for that sum. Kretske told Frank that the money would be delivered to "Red" (R. 296–297). When the Stony Island Avenue still was seized, Frank, Mike, and Anthony Hodorowicz, Swanson, Del Rocco, Horton, and Kretske met at the hardware store. Kretske explained that there was "a lot of heat" on the case but that he would take care of it for $1,200. An initial payment of $500 was made to Kretske, who stated that Glasser would receive a part of the money and nobody "would go to jail" (R. 227, 229–231, 244–245, 297–298, 300).

[6] In the Clem Dowiat case, there was no evidence of such an arrangement. See appendix, *infra*, p. 102.

In each of these cases, Glasser represented the Government and each was disposed of favorably to the member or members of the Hodorowicz crowd involved: In the case of the 119th Street still, operated by Swanson and Del Rocco, only Joppek, the still's attendant (R. 228, 247), was arrested, but he was released by Glasser and none of the three was prosecuted (R. 226, 228, 243–244, 249–250).[7] In the Peter Hodorowicz-Hort case, the matter was "dragged along" in accordance with Miller's promise, and after a true bill was voted by the grand jury, Glasser withdrew it and never represented it (R. 254–258, 265–267, 309, 365, 705; see also R. 704).[8] In the Walter Hort case, Hort was discharged after appearing before the Commissioner (R. 267–268, 287, 309–310).[9] In the case involving the 118th Place still, the Hodorowicz members were dismissed when a motion to suppress the evidence was granted by the Commis-

[7] Glasser explained his action on the ground that it was not his practice to prosecute the minor figures, but rather, he wanted to ascertain through them the identity of the still's owners (R. 932, 964–965). But he did not question Joppek, but simply released him with instructions to return a week later (R. 249–250). The record shows no effort by Glasser to determine through Joppek who owned the 119th Street still.

[8] Glasser justified the withdrawal of this case on the ground that investigator Smallwood wished to use it as part of a larger case against the Hodorowicz crowd (R. 948–949). Smallwood had died before the present trial (R. 958).

[9] Kretske, then still an assistant United States attorney, represented the Government in this proceeding (R. 268, 287).

sioner (R. 258–261, 270–271, 285–286, 296–297).[10] In respect of the Stony Island Avenue still, Anthony Hodorowicz, Swanson, and Dowiat were indicted, but the case was subsequently stricken from the call with leave to reinstate. The three were never thereafter tried on this indictment, and none of the others involved in the still was indicted (R. 230–232, 272–273, 274, 275–276, 342–346; Ex. 226, R. 1034).[11]

Late in 1937, the Alcohol Tax Unit's investigators worked to develop a case against the entire Hodorowicz group (R. 384–385, 387–391, 705–706, 706–708). Evidence was gathered, and Glasser frequently conferred with Bailey, an investigator, on the progress of the case (R. 706–708). In April 1938, Bailey submitted his final report to Glasser, naming all of the Hodorowicz crowd as

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[10] The evidence relating to the disposition of this case seems rather clearly to indicate that the dismissal itself had an innocent explanation: The defendants were arrested when agents of the Alcohol Tax Unit raided a still in premises for which they had no search warrant (R. 277–279). But the evidence also justifies the inference that Glasser advised the defendants in that case to "claim ownership of the still" at the Commissioner's hearing to support their petition to suppress the evidence, which had previously been filed by their attorney (R. 260, 262, 296–297, 317–318; see appendix, *infra*, pp. 102–105).

[11] Glasser explained that this case was stricken at the request of investigator in charge Ritter, who wanted to secure more evidence (R. 918–920). Ritter, though available, did not testify (R. 920–921).

prospective defendants and including much evidence of conspiracy as well as of substantive offenses (R. 708; Exs. 160, 163, R. 712). Glasser told Bailey he would present the case to the jury the following month (R. 708).

In May, according to the testimony of Frank Hodorowicz, Kretske told Frank that Frank was "in a jam" but could avoid an indictment by paying Kretske $1,000. Hodorowicz refused (R. 300; see also R. 262). Early in June, Glasser presented to the grand jury two cases involving the illicit sale of alcohol set out in Bailey's report, and indictments were returned against three of the Hodorowiczes and Dowiat (R. 708–709). Despite Glasser's assurances to Bailey, Glasser did not present the conspiracy case (R. 708).

Upon the return of the indictments, Frank Hodorowicz consulted Kretske, and paid $250 for Kretske to "take care of it" (R. 300–301, 311). Subsequently Kretske told Frank that "they got Glasser over a barrel, he can't do anything," that there was "too much heat," and the case could not be fixed (R. 300–301). Frank then went to Roth, and the latter with Kretske examined "the papers" in Glasser's office (R. 302, 333). Frank Hodorowicz testified that he then called on Glasser to complain that he was getting a "raw deal." Glasser replied that he was helpless, that Frank would have to go to jail, and that Bailey threatened to take Glasser's job unless Glasser secured a conviction

(R. 302). Later, Glasser recommended Hess, an attorney, to Frank as one who could do Frank "a lot of good" (R. 302–303).[12]

Meanwhile, although he repeated his promises to Bailey to present the conspiracy case, Glasser never presented it (R. 709, 710). The Hodorowicz-Dowiat cases were successively continued at Glasser's request, but in February they were brought to trial (R. 710). The Hodorowiczes and Dowiat were convicted, and, although at the time of sentence Glasser was silent on their history and on their counsel's request for probation, Frank was sentenced to imprisonment for a year and a day, and Mike and Peter Hodorowicz and Dowiat for nine months (R. 711). That same day Glasser was relieved of the alcohol tax call (R. 705).

Glasser admitted that it was "probably true" that Bailey's report contained evidence of other substantive offenses committed by the Hodorowicz group, upon which no action was taken (R. 1007). He offered no further explanation for his failure to present them.

We believe that the evidence relating to the Hodorowicz crowd, here briefly summarized, supported the jury's verdict. There was before the jury testimony that in most of these cases, money was paid to stay prosecutive action, and that Hor-

[12] On arraignment, Roth had represented Frank (R. 302, 709).

ton and Kretske, who received some of the payments, stated that the money was to go to "Red", a term which it is undisputed, refers to petitioner Glasser (R. 230, 297, 306, 510, 547). There was also evidence that until February 1938, when the indictment in the Stony Island Avenue case was returned (Ex. 226, R. 1034), no prosecutive action was taken against any of the members of the Hodorowicz gang. Three witnesses testified that $500 was paid to Kretske to fix that case, with a balance of $700 to be paid later (R. 229, 244, 298). The defendants were not prosecuted upon the indictment. The jury could quite properly have concluded, therefore, that the results in these cases were obtained by the payment of money to Glasser. The final result was that, although the Alcohol Tax Unit investigators submitted a great mass of evidence implicating the key figures in the Hodorowicz gang and many minor figures in several violations, the only convictions obtained were those of Frank, Peter, and Mike Hodorowicz and Dowiat in the two cases. Del Rocco and many lesser figures were not even indicted and Anthony Hodorowicz and Swanson, though indicted, were not prosecuted. In respect of the two cases in which convictions were obtained, there was evidence that Frank Hodorowicz refused to pay Kretske $1,000 to prevent an indictment and that one month after such refusal the indictments were returned, though in previous cases, where money

was paid, no prosecutive action was taken. There was in addition evidence that the Alcohol Tax Unit conducted an extensive investigation of the Hodorowicz group, that Bailey was in constant touch with the case after his report was submitted to Glasser and pressed Glasser for action, and that Glasser, on the occasions when Frank Hodorowicz visited him at his office, displayed, at the very least, an undesirable familiarity with a notorious bootlegger. The jury could justifiably infer from this evidence that prosecution even on these charges was delayed and impeded as long as Glasser thought it safe to do so.

With reference to the part played by Roth in these cases, the evidence indicated that the Hodorowicz crowd was referred to him by Kretske, that he was closely associated with Kretske and also talked to Glasser about the cases, and that after it became clear to Frank Hodorowicz that he and his co-defendants would have to stand trial on the June 1938 indictments, Hodorowicz retained other counsel. Frank Hodorowicz testified that this was done upon Roth's suggestion after Roth had seen Glasser (R. 333). This evidence is particularly significant in the light of Roth's efforts at the trial below to show that he was an expert in handling cases in the federal courts (R. 796, 749–750, 782, 783, 833–834, 882, 889, 890). The jury could properly have concluded

from this evidence that Roth's role in the conspiracy was to represent the accused in order to give the appearance of arm's-length dealing with Glasser.

The cases involving Kaplan and his associates.—Much the same pattern is presented by the cases involving Kaplan, a defendant below, and his associates.

Kaplan was engaged in the illicit alcohol business in and around Chicago (R. 452–453, 460, 530, 537–538); he was reputed to be a leading bootlegger (R. 530). His associates included Raubunas, Dewes, Slesur, Widzes, Cole, Pregenzer, Boguch, Rankin, Fernandez, and Simms (R. 452–454, 460, 462–463, 537–538). The activities of Kaplan and these men gave rise to the following cases, among others, concerning which evidence was adduced at the trial below: The Western Avenue and the Spring Grove stills, the Boguch removal case, and the Beisner farm still. The circumstances of each of these cases are set out in the appendix, *infra*, pp. 117–135).

Briefly, the evidence relating to Kaplan and his associates is as follows:

After the raid on the Western Avenue still, in which Kaplan, Raubunas and Widzes were partners (R. 366, 452–454), Kaplan told Raubunas and Widzes that the case could be "squashed" "in the

federal building" for $500.[13] Raubunas paid the sum to Kaplan. (R. 458–459.) Raubunas was later brought to Glasser's office, but Glasser released him (R. 463–464). Thereafter, Kaplan, Raubunas, Dewes, and Slesur set up a new still at Spring Grove (R. 367–368, 460–463, 537–538, 569–570, 582, 620, 623, 626), which was raided in January 1937. Boguch and Rankin, two persons working for Kaplan, were arrested on the premises (R. 367, 465, 529, 538, 620). They were released on bonds furnished by Horton, who sent them to Kaplan. Kaplan assured Boguch and Rankin that "everything will be taken care of, that they would postpone the case until it got dusty, and would forget about it, drop it". (R. 368–369, 620.) Kaplan told Raubunas they were in trouble and asked for $500 so that the case might be "taken care of" in the Federal Building. Raubunas paid (R. 465–466).

Thereafter, the Alcohol Tax Unit submitted reports to Glasser concerning these two stills, and implicating Kaplan, Raubunas, Dewes, Slesur, Widzes, Cole, Pregenzer, Rankin, Boguch, and

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[13] Raubunas testified that before assuming an interest in the still, Kaplan assured him that the still was "protected" by Kaplan's payment of $400 to "big people" in the Federal Building (R. 453–454). Raubunas identified the "big people" as Glasser and Kretske (R. 453–454, 456, 457–458, 462, 464, 470, 475). But it should be pointed out that Raubunas' account of these "protection" payments does not appear to be particularly persuasive because of their probable lack of inherent credibility.

others (R. 444–445, 451–452, 529–530, 539–540; Ex. 81A, R. 529; Ex. 113, R. 532). Glasser presented the Spring Grove case to the grand jury in August 1937 (R. 528, 530–531) but withdrew it (R. 528, 531). In October 1937, he presented both the Spring Grove and Western Avenue cases to the grand jury (R. 528, 531). The former, however, was again withdrawn by Glasser (*ibid.*), and in respect of the Western Avenue case, Kaplan, Raubunas, Widzes, and Boguch, all key figures, were no-billed (R. 528).[14] Two days before Glasser presented the Spring Grove case to the grand jury for the third time in May 1938 (R. 528–529), Horton told Dewes that Kretske wanted to see him.[15] Dewes called on Kretske, who told Dewes that Dewes should pay him $100, Kretske would send the money to Glasser, and Dewes would be "no-billed" by the grand jury. (R. 542–543.) Finally, after Glasser advised the grand jury concerning whom it should indict (R. 589), a true bill was returned against Slesur, Cole, Pregenzer, Rankin, and Boguch,[16] and a no-bill was returned as to Kaplan, Dewes, and Rau-

[14] Glasser testified that he presented to the grand jury all available evidence (R. 918), and that he concurred in the no-bill (R. 970).

[15] Kretske had resigned as assistant United States attorney (R. 187, 801).

[16] Subsequently, Kretske warned Dewes not to discuss the circumstances under which Dewes was no-billed (R. 544). The men named in the indictment were not brought to trial while Glasser was in office (Ex. 177, R. 1034; see also 380, 583, 621).

bunas (R. 528–529), three of the four partners in the still. Not until Glasser's successor re-presented the Spring Grove case were these three indicted (Ex. 130; see also R. 489, 517–518, 550, 713–714).[17]

Other cases involving members of the Kaplan group presented a similar sequence of events. After Boguch was arrested for removal to Montana (R. 290–291, 369–370), he paid Kaplan $250 to "take care" of the case (R. 369–370, 376–377), and subsequently the proceeding was dismissed by the Commissioner on the Government's motion (R. 290–291, 370–371). In November 1937, the Beisner farm still was raided; Farber, Widzes, Beisner, and Neiss were arrested (R. 468–469, 540–541, 689–690). Raubunas Dewes, and Farber first negotiated with Horton to "fix" the case but since they thought his price was too high (R. 469–470, 541–542, 548), Farber took Raubunas and Dewes to Kretske's office. The latter agreed to "take care" of the case for $1,200. (R. 470, 542, 548.) After Raubunas paid Kretske $300 as his share (R. 470, 542, 548), Kretske assured Raubunas that it would not be necessary for the defendants to have a lawyer at the Commissioner's preliminary hearing because "Red" would be there (R. 471). In November 1938 Raubunas, Dewes, and Beisner were

[17] Glasser explained the disposition of the Spring Grove case on the ground that Cole, a key witness, was unreliable, and that the first withdrawal was at the request of the Alcohol Tax Unit investigator (R. 923–925).

indicted and Farber, Widzes, and Neiss were no-billed (R. 290, 697–698; Ex. 169, R. 712, 1034). Dewes thereafter paid Kretske $275 to "fix" his case with Glasser (R. 543–545, 547). No further action was taken against the Beisner farm participants until Glasser's successor re-presented the case and secured an indictment against Raubunas, Dewes, Beisner, Farber, Widzes, Neiss, and one Duthorn (Exs. 168, 169, R. 712, 1034).

Thus, of this large group of bootleggers, various combinations of whom were involved in these and other cases (R. 689, 690, 698, 699, 700 [Ex. 157, R. 698; Ex. 195]; R. 623–624, 629, 630, 631, 632 [Exs. 172, 178, R. 712, 1034]; R. 620–621, 623, 625 [Ex. 179, R. 1034]), none was brought to trial and convicted during Glasser's tenure in office. Farber, who Kretske admitted he had known for "maybe ten years" (R. 810), pleaded guilty in one case and, with Glasser appearing for the Government, was placed on probation (R. 689, 690, 699; Exs. 157, 195, R. 698). Glasser, it seems (compare R. 630 with R. 826–827), appeared for the Government on March 31, 1939, when Slesur entered guilty pleas on three indictments pending against him (including the June 1938 Spring Grove indictment), but Glasser's successor appeared when Slesur was later sentenced to the penitentiary (R. 630, 827; Exs. 172, 177, 178, 179, R. 712, 1034). Kaplan, the principal figure in the Western Avenue and Spring Grove cases, and Widzes, who was involved in the Western Avenue

and Beisner farm stills, were not even indicted. And Raubunas and Dewes, though indicted in the Beisner farm case, and many minor figures who were indicted in the Spring Grove and Beisner farm cases, were not brought to trial.

Other cases.—Other cases involved in the instant trial were the Kwiatkowski case, the Abosketes matter, the Vitale cases, and the Wroblewski brothers cases (see appendix, *infra,* pp. 135–152).

After Kwiatkowski was apprehended while leaving premises in which a still was later discovered and with illicit alcohol in his possession (R. 393, 395–396), he paid Horton $600 to fix the case (R. 413).[18] Kwiatkowski was thereafter discharged by the Commissioner for lack of probable cause (R. 288–289, 413–414). Although Ritter, an Alcohol Tax Unit investigator, subsequently transmitted a supplemental report setting out additional evidence and requesting reconsideration (R. 585–586; Ex. 230, R. 1034), Glasser took no further action against Kwiatkowski (R. 961–963).[19]

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[18] The statement in Glasser's brief (p. 77) that Kwiatkowski testified on cross-examination (R. 415) that he did not pay $600 to Horton to fix his case should be compared with Kwiatkowski's testimony on direct (R. 413) and the entire cross-examination of Kwiatkowski (R. 414–432), and especially his statements at pages 419–420.

[19] Glasser's successor secured an indictment against Kwiatkowski (R. 430). Glasser testified that he could not recall receiving the supplemental report (R. 961–963).

Abosketes was suspected of being a leading figure behind a certain still (R. 647). One Brown and others, who had previously been convicted in connection with the violation, were questioned by Glasser and an investigator concerning Abosketes' connection with the still (R. 647–649). Simultaneously, Brantman, an accountant (R. 650), got in touch with Abosketes, told him he was going to be indicted in the northern district of Illinois, and offered to fix the case with somebody in the Federal Building for $5,000 (R. 663–664, 665, 668, 669–670, 672). Abosketes paid Brantman $3,000 for "services rendered" (R. 651, 666, 670; Ex. 134, R. 651), and Brantman transmitted the money to Kretske (R. 652). Abosketes was not indicted in that district (R. 663, 666).

In the Vitale cases, Leo Vitale, owner and operator of a still which had been raided, was arrested (R. 441, 442; Ex. 210, report dated September 2, 1936), arraigned, and pleaded guilty (R. 250, 253; Ex. 165, R. 712, 1034). On Glasser's recommendation, Vitale received a sentence of one hour in the custody of the marshal (R. 250–251), a recommendation which he could not subsequently explain to the judge (R. 253). Shortly after, Vitale's residence was raided, a still was seized, and a car was found in the garage a few feet from the residence (R. 218–219; Ex. 36). The car had been used in the distilling business (R. 219, 224; Ex. 210, report dated August 31,

1938). In a libel action against the car, Vitale's wife, Rose, was the claimant (R. 218–219, 222; Ex. 36). Without contradiction by Glasser, who represented the Government, Roth, counsel for Vitale's wife, stated at the hearing that Vitale was "O. K." and that the car was not used for illegitimate purposes. When Dowd, an Alcohol Tax Unit investigator who had investigated the case, and who was present at the proceeding, protested to Glasser that the full facts were not being disclosed, and asked to be allowed to testify, Glasser ordered Dowd out of the courtroom and the libel was dismissed. (R. 219–220.) Dowd subsequently reported to Glasser that Vitale had boasted that "he got out of this for nine hundred dollars" and that Dowd had interviewed a number of witnesses to whom Vitale spoke (R. 221). Glasser took no action (*ibid.*).

Direct evidence of the participation of Roth and Glasser in the conspiracy.—In addition to the evidence summarized above relating to their participation in the cases, other direct evidence was presented concerning Roth and Glasser.

In respect of Roth, the following testimony was adduced: the Wroblewskis were indicted in the Northern District of Indiana for conspiracy (R. 680). Alexander Campbell, an assistant United States attorney in that district, testified that Roth appeared in his office and inquired whether "some arrangement can be made so that [the Wroblewskis] will not be indicted." Roth offered Camp-

bell $500 or $1,000. When Campbell refused, Roth replied "Well, that is the way we handle cases in Chicago sometimes." (R. 681–682.) Subsequently Roth asked Campbell to use his influence to stop the investigation which led to the present case (R. 683–685).

There was also direct evidence concerning Glasser's role in the conspiracy. We have already pointed out the repeated and corroborated testimony concerning Kretske's statements that the payments of money were to go to "Red" (Glasser) (R. 226, 230, 243, 297, 305–306, 471, 475, 510, 543, 547). In addition, Raubunas testified, though perhaps not entirely convincingly, that on three occasions he saw Glasser and Kretske, in a car, pick Kaplan up on a street corner (R. 457–458, 462), while another witness, Svec, testified to facts indicating meetings between Glasser and Yarrio (R. 563–564), a bootlegger who had been indicted but never convicted (R. 194, 195, 699, 211). Further, there was testimony that Glasser, after Frank Hodorowicz had been indicted, apologized to Frank, and explained that he would have to convict Frank because the situation was becoming uncomfortable for Glasser (R. 302, 303–304). Hodorowicz also testified that Glasser advised him on a choice of his attorney (R. 302–303). Glasser's direct participation is also indicated by his expulsion of Dowd from the court room in the Rose Vitale libel case (R. 219–220) and by Glasser's release of Joppek (R. 249–250) and Raubunas

(R. 463–465). Finally, there is uncontroverted evidence that Glasser received and accepted a case of liquor sent to him for Christmas by Frank Hodorowicz (R. 302).

Summary.—No single case and no single incident compel the conclusion of Glasser's guilt. Nevertheless the cumulative effect is considerable. A common pattern runs throughout the specific cases here involved: In the preliminary stages of a case, either just before or after indictment, Horton (or in some cases Miller or Brantman), displaying a suspicious advance knowledge of the proceedings, sought out the potential defendants. The latter were directed, usually by Horton, to Kretske. Kretske, in turn, suggested his ability to "fix" the case and solicited money, announcing it was to go to Glasser. Kretske then referred the matter to Roth. Thereafter, except where payment had been refused or where the evidence indicated Glasser found he must proceed because of pressures, the case, in one way or another, died. Against this is the persuasive evidence of the guilt of the potential defendants, evidence which was available to Glasser at the time. And finally, there is Glasser's inability, on the stand, satisfactorily to explain the history of many of these suspicious cases.[20]

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[20] Glasser's credibility was, of course, an issue for the jury. And his credibility was seriously impaired by his uncertain testimony on cross-examination and by his self-contradictions. Thus, in connection with the case in which

These circumstances, coupled with the direct evidence of Roth's and Glasser's participation, were, we submit, sufficient to permit the jury to conclude that the defendants were guilty. There was sharply conflicting evidence. Glasser's own credibility was crucial, and, in general, the issues were largely issues of credibility. The case, then, was one peculiarly within the province and competence of the jury. There was sufficient evidence to permit the jury to resolve the issues and to justify its conclusion.

II

THE RECORD SHOWS THAT THE INDICTMENT WAS RETURNED IN OPEN COURT BY THE GRAND JURY

Petitioners contend (Glasser Br. 12–20; Kretske Br. 20–24; Roth Br. 56–59) that the record fails to show that the indictment was returned in open court by the grand jury. No contention seems to be made that the indictment was not in fact returned in open court.

Vitale was sentenced to one hour in the custody of the marshal. Glasser first testified that he did not tell the judge about another offense which had been reported to him (R. 998) and then that he was "anxious to tell Judge Wilkerson the type of fellow Vitale was and I did" (R. 999). Again, he testified that he was "trying to get the Hodorowiczes" (R. 1004), but admitted that the Alcohol Tax Unit's report on the general investigation of the Hodorowicz group "probably" contained evidence of substantive offenses against many members of the group who were not prosecuted (R. 1005–1007).

The *placita* (R. 1) discloses the convening of the District Court for the Northern District of Illinois, Eastern Division, "on the first Monday of September [1939] (it being the twenty-ninth day of September the indictment was filed)" and recites the presence of the various judges of the court, including District Judge Stone who sat as a member by designation and presided at the trial, the marshal, and the clerk. On the face of the indictment appears the endorsement "Filed in open court this 29th day of Sept., A. D. 1939, Hoyt King, Clerk," preceded by the notation "A true bill, George A. Hancock, Foreman" (R. 38).

These records are sufficient to show the proper return of the indictment. In *Ledbetter* v. *United States,* 108 Fed. 52 (C. C. A. 5), the court, in deciding the sufficiency of the record to show that the indictment there involved had been returned in open court, had before it the minute entry, "Nov. 21, 1899. The grand jury came into court and returned 52 bills of indictment, each of which was indorsed 'A true bill,' and signed by Jas. W. Powell as foreman", and a file mark of the clerk of court, "Filed in open court this 21st day of November, 1899. J. W. Dimmick, Clerk." The court stated (p. 55):

> * * * It seems to be well settled that the record must show that the indictment was returned into court by the grand jury *either* by a minute entry to that effect *or by in-*

> *dorsement of the fact upon the indictment itself* * * * [Italics supplied.] [1]

The endorsement on an indictment—"Filed in open court,"—together with the date and clerk's signature, has been deemed a sufficient record entry by several state courts. See *Mose* v. *The State,* 35 Ala. 421; *People* v. *Blackwell,* 27 Cal. 65; *Westcott* v. *State,* 31 Fla. 458; *William Goodson* v. *The State of Florida,* 29 Fla. 511; *Spencer* v. *Gomez,* 114 Fla. 688, 695; *The State* v. *Crilly,* 69 Kan. 802, 77 P. 701; *State* v. *Luce,* 194 Iowa 1306, 191 N. W. 64.[2] And the endorsement—"A True Bill"—signed by the foreman, and the word "Filed", followed by the date and signature of the clerk of court, was deemed a sufficient record entry in at least two cases. See *State* v. *Grate,* 68 Mo. 22; *Cooper* v. *State,* 59 Miss. 267.

But the endorsement on the indictment is not the only record showing of a return in open court. There appears in the record, immediately after the clerk's endorsement on the indictment, the following (R. 38–39):

> * * * on the 29th day of September A. D. 1939, being one of the days of the regular September term of said Court, in

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[1] The record entries were held to be sufficient even though the court had to refer to the bill of exceptions to identify the indictment, the caption thereof having been erroneously entitled "Circuit Court" when in fact it had been returned in the district court.

[2] One case, *Shinn* v. *State*, 93 Ark. 290, is to the contrary.

the record of proceedings thereof, in said entitled cause [the title of this case as No. 31825 in the District Court is contained at the top of the same page], before the Honorable James H. Wilkerson District Judge appears the following entry, to-wit:

UNITED STATES DISTRICT COURT

Northern District of Illinois

(Date) Sep. 29, 39.

Cause No. ----------
Title of Cause ----------

Df. Ex. 1

11/7/39.

Brief Statement of Motion
The Grand Jury return 4 indictments in open Court. Added 10/30/39
Name of moving Counsel
Representing
Order discharging Grand Jury of Sept. Term 1939.
Name of opposing Counsel (if any)
JHW
Hand this memorandum to the Clerk.
Counsel will not rise to address the Court until motion has been called.

The notation, "The Grand Jury return 4 Indictments in open Court. Added 10/30/39," was made by Judge Wilkerson (JHW) on a form. Since this form with Judge Wilkerson's notation is an entry in the record of the proceedings in this case (R. 38), it is manifest that the notation can

be interpreted in no other way than as including the indictment under which petitioners were prosecuted. The entry in its setting would be totally irrelevant under a contrary interpretation.

This entry was, we think, ordered by Judge Wilkerson to be made so that the record might more specifically show that the indictment was returned in open court by the grand jury and thereby to avert, on the motion to quash, the technical argument now advanced here. This does not vitiate the validity of the entry. A *nunc pro tunc* order may be made at a later term to amend or correct the record to make it conform to the actual facts. *Gagnon* v. *United States,* 193 U. S. 451; *In re Wight, Petitioner,* 134 U. S. 136, 144–147; *Downey* v. *United States,* 91 F. (2d) 223, 233–234 (App. D. C.); *Slade* v. *United States,* 85 F. (2d) 786, 787 (C. C. A. 10); *Rardin* v. *Messick,* 78 F. (2d) 643, 645 (C. C. A. 7); *United States* v. *Bishop,* 47 F. (2d) 95, 96 (C. C. A. 5); *International Harvester Co.* v. *Carlson,* 217 Fed. 736, 738 (C. C. A. 8); *Cornette* v. *Baltimore & O. R. Co.,* 195 Fed. 59, 60–61 (C. C. A. 3); *United States* v. *Stoller,* 180 Fed. 910, 913 (E. D. Wash.); *Sweeney* v. *Greenwood Index-Journal Co.,* 37 F. Supp. 484, 487 (W. D. S. C.). Here there was an endorsement on the indictment of "Filed in open court," which might possibly not be interpreted as showing the return in open court by the grand jury. The addition of, "The Grand Jury return * * * in open Court," amends and clarifies the written

endorsement on the indictment. It is not necessary to the validity of a *nunc pro tunc* order that the defendants be given notice thereof before its entry. *United States* v. *Bishop,* 47 F. (2d) 95, 96 (C. C. A. 5).

It is clear, therefore, that the record affirmatively shows the return of the indictment in open court by the grand jury. Even if it were assumed that this record showing was made without authority, as petitioners contend, it nevertheless reflects the actual facts relating to the return. Consequently petitioners' argument on this point must be interpreted as addressed to a technicality of form.[3] Title 18, Section 556, U. S. C., directs that:

> No indictment found and presented by a grand jury in any district or other court of the United States shall be deemed insufficient, nor shall the trial, judgment, or other proceeding thereon be affected by reason of any defect or imperfection in matter of form only, which shall not tend to the prejudice of the defendant, * * *.

Petitioners have not attempted to show prejudice resulting from the lack of record entries different than those which actually appeared.[4]

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[3] Compare *Breese* v. *United States*, 226 U. S. 1, in which the Court held that the *fact* that the return was not made in open court by the grand jury as a body "was a defect in the matter of form only" (p. 11).

[4] The case of *Crain* v. *United States*, 162 U. S. 625, cited and quoted from by petitioners, requires only an *affirmative* showing of *arraignment* in the record.

III

THE DISTRICT COURT PROPERLY REFUSED TO QUASH THE INDICTMENT ON THE GROUND OF ALLEGED ILLEGAL COMPOSITION OF THE GRAND JURY

Petitioners contend that the trial court erred in denying their motion to quash the indictment on the ground that the grand jury was illegally constituted because of the deliberate exclusion of women's names from the container from which the grand jurors' names were selected (Roth Br. 67–70; Glasser Br. 20–23; Kretske Br. 19–20). The gist of petitioners' argument is that the Illinois laws, effective prior to the summoning of the grand jury in the instant case,[1] required the jury lists throughout the state to contain names of women, and that the jury commissioner and the court clerk disregarded the man-

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[1] The grand jury was summoned on August 25, 1939 (R. 144–145, 148, 1118). On May 12, 1939, there were approved two amendatory acts of the legislature of Illinois. Section 1 of Chapter 78 of the Illinois Revised Statutes, 1939, applies to counties not having jury commissioners (see Illinois Revised Statutes, Chapter 78, Section 2), and provides:

"The county board of each county shall, at or before the time of its meeting, in September, in each year, or at any time thereafter, when necessary for the purpose of this Act, make a list of sufficient number, not less than one-tenth of the legal voters of each sex of each town or precinct of the county, giving the place of residence of each name on the list, to be known as the jury list."

Section 25 of Chapter 78 of the Illinois Revised Statutes, 1939, applies to counties having jury commissioners (see Illinois Revised Statutes, 1939, Ch. 78, Sec. 24) and provides, in part:

date of 28 U. S. C. 411[2] by omitting the names of women from the grand jury list. We submit, however, that the composition of the grand jury was proper, and even if this were not so, the motion to quash the indictment was properly overruled.

Section 1 of Chapter 78 of the Illinois Revised Statutes (1939) provides that—

> The county board of each county shall, at or before the time of its meeting, in September, in each year, or at any time thereafter, when necessary for the purposes of this Act, make a list of a sufficient number * * * of each sex * * * to be known as the jury list.

Petitioners insist that this provision requires the inclusion of women on the grand jury sum-

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"The said commissioners upon entering upon the duties of their office, and every four years thereafter, shall prepare a list of all electors of each sex between the ages of 21 and 65 years, possessing the necessary legal qualifications for jury duty, to be known as the jury list. * * *"

These amendatory acts became effective July 1, 1939 (Article IV, Section 12, Illinois Constitution). On August 8, 1939, the Supreme Court of Illinois upheld the constitutionality of Section 25 of Chapter 78. *People* v. *Traeger*, 372 Ill. 11.

[2] This section provides:

"Jurors to serve in the courts of the United States, in each State respectively, shall have the same qualifications * * * and be entitled to the same exemptions, as jurors of the highest court of law in such State may have and be entitled to at the time when such jurors for service in the courts of the United States are summoned."

moned on August 25, 1939.[3] But the statute is unambiguous in permitting county boards to make up their county lists *at*, as well as before, their September meetings, and in addition, in permitting to boards to make up a list "at any time thereafter, when necessary for the purpose of this Act." We think it to be plain that the statute did not require the calling of women at the time here in controversy.[4]

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[3] The Government, in its brief in the court below, conceded that "it was the law in Cook County that jury commissioners should place women on jury lists on and after July 1, 1939" (page 18). This concession was based upon the holding of *People* v. *Traeger*, 372 Ill. 11. A study of this case, however, discloses that the sole problem before the court was whether the legislative act making women eligible for jury duty violated the Illinois constitution. The statute, both before and after amendment, provided, *inter alia*, that the jury "list may be revised and amended annually in the discretion of the commissioners." This case arose on a petition for a writ of mandamus against the commissioners "to test the constitutionality of an act [woman jurors] * * *." The court simply held that during the course of such a voluntary, discretionary, annual revision, the commissioners must include the names of eligible women. The problem was not presented, nor did the court decide, whether mandamus would be granted against the commissioners to compel them to engage in an annual revision and amendment, if they did not do so voluntarily.

[4] We do not contend, as claimed by petitioner Glasser (Br. 22), that only women whose names appeared on the lists of the county boards were eligible for federal jury service. We simply maintain that so brief a period elapsed between July 1, 1939, the effective date of the state law rendering women eligible as jurors (held constitutional August 8, 1939) and August 25, 1939, the date the grand jury was summoned, that it was not error to omit the names of women from the federal jury list where it was not shown that women's names had yet appeared on the state jury lists.

Even assuming that the selection of the grand jury was technically irregular because of the omission of women, the denial of petitioners' motion to quash on that ground was not error. The question in issue here is not one of the inclusion of disqualified persons[6] nor is it one of systematic and arbitrary exclusion of persons solely because of their race or color in a case in which the defendant belongs to the excluded race or color. Cf. *Norris* v. *Alabama,* 294 U. S. 587. The question here raised is quite different. Prejudice to the defendant's case is justly inferable where there is racial exclusion; but where women are excluded, although eligible, at most there is irregularity without implication of injury. *Wuichet* v. *United States,* 8 F. (2d) 561, 563 (C. C. A. 6); *United States* v. *Ballard,* 35 F. Supp. 105, 107 (S. D. Calif.).

It is well established that an indictment cannot be quashed, nor a plea in abatement thereto be sustained, merely because of an irregularity in the drawing of the grand jury, where no prejudice to the accused is shown. *Agnew* v. *United States,* 165 U. S. 36, 44; *United States* v. *Parker,* 103 F. (2d) 857, 859 (C. C. A. 3), certiorari denied, 307 U. S. 642; *Walker* v. *United States,* 93 F. (2d)

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[6] For this reason, *Crowley* v. *United States,* 194 U. S. 460, and similar cases cited by petitioner Roth (Br. 69–70) and Kretske (Br. 19) are not relevant. Petitioners contend only that persons equally competent were excluded. See *United States* v. *Gale,* 109 U. S. 65, 70.

383, 391 (C. C. A. 8), certiorari denied, 303 U. S. 644; *Morrison* v. *United States,* 71 F. (2d) 358, 359 (C. C. A. 5), certiorari denied, 293 U. S. 589; *Moffatt* v. *United States,* 232 Fed. 522, 528 (C. C. A. 8); *Stockslager* v. *United States,* 116 Fed. 590, 596 (C. C. A. 9); *Brookman* v. *United States,* 8 F. (2d) 803, 806 (C. C. A. 8).[6]

In *Hyde* v. *United States,* 225 U. S. 347, this Court said (p. 374):

> It is not shown that any juror was disqualified, nor is it shown that the grand jury was composed of jurors not selected by the commission. It is alleged, it is true, that names which had been put in the box by the commissioners had been taken out by Harstock, and that he put back only those that he deemed fit and proper. It follows, of course, from this that had all of the original names been in the box the grand jury might have been differently composed, but from this it cannot be inferred that injury or prejudice resulted to the defendants.

The burden is upon the defendants to show by averment of specific facts that they were preju-

[6] In *United States* v. *Cornell,* 25 Fed. Cas., No. 14,868, at 656 (D. R. I. 1820). Justice Story, in denying a motion for a new trial in a murder case said: "Even if a juror had been set aside by the court for an insufficient cause, I do not know that it is a matter of error, if the trial has been by a jury duly sworn and impaneled, and above all exceptions. Neither the prisoner nor the government in such case have suffered any injury."

diced by the alleged irregularity. *Brookman* v. *United States,* 8 F. (2d) 803, 806 (C. C. A. 8).[7] Petitioners have failed to sustain this burden and, therefore, the motion to quash was properly overruled. See also *Salen* v. *State,* 231 Wis. 489 (1939).[8]

IV

THE INDICTMENT IS NOT FATALLY DEFECTIVE

A. THE SECOND COUNT OF THE INDICTMENT DOES NOT CHARGE A CONSPIRACY TO VIOLATE THE BRIBERY STATUTE

Petitioners Glasser (Br. 30–31) and Roth (Br. 65–66) urge that the charging part of count 2 (par. 14, R. 28) is framed in the words of Title 18, Section 91, U. S. C., and that, therefore, the count is defective because in effect it charges a conspiracy

[7] *People* v. *Mack*, 367 Ill. 481; *People* v. *Clampitt*, 362 Ill. 534; *People* v. *Schraeberg*, 347 Ill. 392; *People* v. *Fudge*, 342 Ill. 574; *People* v. *Mankus*, 292 Ill. 435; *People* v. *Linquist*, 289 Ill. App. 250, all cited on page 70 of Roth's brief, illustrate the Illinois rule that no prejudice need be shown where no attempt is made to adhere to the statutes relating to the drawing of the grand jury, but that prejudice need be shown only when an irregularity occurs after an attempt to comply with the law. It is obvious, however, that the Illinois rule, so far as it specifies no prejudice need be shown, is inconsistent with the federal holdings. See also *Salen* v. *State*, 231 Wis. 489.

[8] Moreover, since the petitioners are not members of the class allegedly excluded from the jury lists they are in no position to complain. *United States* v. *Gilbert*, 31 F. Supp. 195 (S. D. Ohio); *State* v. *James*, 96 N. J. L. 132, 142–145 (1921); *McKinney* v. *State*, 3 Wyo. 719, 726–729 (1892); *Griffin* v. *State*, 183 Ga. 775, 778 (1937); *Commonwealth* v. *Garletts*, 81 Pa. Super. 271, 276 (1923).

to commit a substantive offense requiring concerted action. They contend that, consequently, it cannot be the subject of a conspiracy under Title 18, Section 88, U. S. C. It is unnecessary here to inquire whether "the conclusion would follow from the premises, since it is clear that the premises are not true" (*United States* v. *Manton,* 107 F. (2d) 834, 839 (C. C. A. 2), certiorari denied, 309 U. S. 664).

Paragraph 14 of count 2 (R. 28) charges that the defendants named—

> * * * conspired * * * to defraud the United States of and concerning its governmental function to be honestly, faithfully and dutifully represented in the courts of the United States by a United States Attorney or an Assistant United States Attorney to prosecute certain delinquents for crimes and offenses cognizable under the authority of the United States as the same should be presented and determined according to law and justice, free from corruption, improper influence, dishonesty or fraud, more particularly its right to a conscientious, faithful, and honest representation of its interests in certain suits, controversies, proceedings, matters, actions, and causes brought and pending in the United States Courts in the Northern District of Illinois; * * *

The charge is clearly stated as a conspiracy to defraud the United States, which is a crime *per se* without reference to any substantive offense. *United States* v. *Manton, supra; Crawford* v.

United States, 212 U. S. 183; *United States* v. *Holt,* 108 F. (2d) 365 (C. C. A. 7), certiorari denied, 309 U. S. 672; *United States* v. *Orr,* 223 Fed. 220 (D. R. I.); *United States* v. *Milner,* 36 Fed. 890 (N. D. Ala.). The charge of defrauding the United States by depriving it of its lawful governmental functions by dishonest means is a defrauding within the conspiracy statute (U. S. C., Title 18, Sec. 88). *Hammerschmidt* v. *United States,* 265 U. S. 182, 188; *Haas* v. *Henkel,* 216 U. S. 462, 479; *United States* v. *Manton, supra.*

Bribery is alleged in paragraph 14 (R. 28) only as the "deceit, craft or trickery" or "means that are dishonest" (*Hammerschmidt* v. *United States, supra,* p. 188) by which the defendants conspired to defraud the United States. The allegation is of conspiracy to defraud the United States with respect to its lawful governmental functions "*by* promising, offering, causing and procuring to be promised and offered, money * * * to an officer of the United States * * *, *with intent to* influence his decision and action" in official matters, "and with the intent to influence such officer or officers * * * to collude in commiting certain frauds on the United States," and "to induce such officer or officers to do or omit from doing certain acts in violation of his or their lawful duty" [Italics supplied]. This language is, of course, part of the charging portion of the count, but the mere fact that it relates to bribery does not, as petitioner Glasser contends, convert the charge of conspiracy to defraud the United States through

the use of bribery into a charge of conspiracy to commit the substantive offense of bribery.

There is no allegation in count 2 that the defendants conspired to commit a substantive offense nor is there reference made to the offense of bribery contained in Title 18, Section 91, U. S. C.[1] Such allegations are contained in count 1, which specifically alleged that the defendants conspired to violate the bribery statute (R. 8–9). That count was dismissed when the Government elected to stand upon count 2 (R. 100).

Plainly, here as in *United States* v. *Manton, supra,* p. 839:

> * * * The indictment does not charge as a substantive offense the giving or receiving of bribes; nor does it charge a conspiracy to give or accept bribes. It charges a conspiracy to obstruct justice and defraud the United States, the scheme of resorting to bribery being averred only to be a way of consummating the conspiracy and which, like the use of a gun to effect a conspiracy to murder, is purely ancillary to the substantive offense. * * *

See also, *Crawford* v. *United States,* 212 U. S. 183, 188–192; *United States* v. *Milner,* 36 Fed. 890 (N. D. Ala.). Cf. *United States* v. *Holt,* 108 F.

[1] Throughout count 2, in the paragraphs charging the manner and means (par. 15, R. 29) of executing the object of the conspiracy (par. 15–39, R. 29–37), the use of bribery as a means of *defrauding the United States* is repeatedly alleged in the following language: "to * * * aid the defendants in committing a certain fraud on the United States" (par. 17, R. 29); in order "to collude in a fraud on

(2d) 365, 368 (C. C. A. 7), certiorari denied, 309 U. S. 672; *United States* v. *Orr,* 223 Fed. 220 (D. R. I.).

B. THE SECOND COUNT IS NOT VAGUE, INDEFINITE, OR UNCERTAIN, NOR DOES IT STATE IMPROPER CONCLUSIONS

Each of the petitioners (Glasser Br. 27–30; Kretske Br. 24–43; Roth Br. 59–65) contends that the second count of the indictment is fatally defective for vagueness and failure to inform them of the charges against them. We submit that these contentions are without merit.

The allegations of the indictment (see especially paragraphs 1–13, R. 22–27) follow the same pattern of the allegations of a similar count held to be sufficient in *Crawford* v. *United States,* 212 U. S. 183. The rule has been established that the allegations of a conspiracy indictment must show "certainty, to a common intent." *Williamson* v. *United States,* 207 U. S. 425, 447; *Thornton* v. *United States,* 271 U. S. 414, 424. Paragraph 14

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the United States" (par. 18, 23; R. 29–30, 30–31); "to allow a fraud to be committed on the United States" (par. 19, 24; R. 30, 31); "to make opportunity for the commission of a fraud on the United States" (par. 20, 25; R. 30, 31); "to unlawfully commit a fraud on the United States" (par. 30, R. 32); so that "a fraud would be committed on the United States" (par. 33, R. 33–34); to influence Glasser and Kretske "in their official capacity" (par. 15, 16, 29, 33; R. 29, 32, 33–34); to influence defendants Glasser and Kretske to do certain acts "in violation of" their "lawful duties" as assistant United States attorneys (pars. 21, 22, 26, 27, 31, 32, 35; R. 30, 31, 32–33, 34); and to influence defendants Glasser and Kretske "unfaithfully [to] discharge their duties toward the United States as Assistant United States Attorneys" (par. 28; R. 31–32).

of count 2 (R. 28) clearly alleges the object of the conspiracy and paragraphs 15–39 are devoted to detailing the precise manner and means of effecting the object of the conspiracy. Several overt acts are set out (R. 37, 17–21). We think the test of "certainty, to a common intent" is fully met. It was not necessary to apprise the defendants of the details of each transaction, involving solicitation of money, which they conspired to execute to defraud the United States. In a charge of conspiracy "the conspiracy is the gist of the crime," "it may, therefore, be assumed that the persons who were to be" solicited, "and the time and place of such" solicitation, "had not been determined at the time of the conspiracy" (*Williamson* v. *United States, supra,* pp. 447, 449). Further (*Williamson* v. *United States, supra,* p. 449):

> * * * It was not essential to the commission of the crime that in the minds of the conspirators the precise persons to be suborned [solicited here] or the time and place of such suborning [soliciting], should have been agreed upon, and as the criminality of the conspiracy charged consisted in the unlawful agreement to compass a criminal purpose, the indictment, we think, sufficiently set forth such purpose.

A fortiori, it was unnecessary to allege particular "questions, matters, causes, proceedings, fraud, act, or omission of act" (Roth Br. 62) in connection with the object of the conspiracy.

Nor was it necessary to allege particulars con-

cerning time, place, circumstances, causes, and the like in stating the manner and means of effecting the object of the conspiracy. *Crawford* v. *United States,* 212 U. S. 183, 192; *Dealy* v. *United States,* 152 U. S. 539, 543; *Houston* v. *United States,* 217 Fed. 852 (C. C. A. 9), certiorari denied, 238 U. S. 613; *Enrique Rivera* v. *United States,* 57 F. (2d) 816, 819 (C. C. A. 1). Cf. *Lamar* v. *United States,* 241 U. S. 103. As stated in *Houston* v. *United States, supra,* p. 856, "It is enough if such an indictment contain a general description of the means."

The specificity of detail urged by petitioners is not essential to the sufficiency of count 2; it comes within the scope of a motion for a bill of particulars. Petitioners did, in fact, request (R. 61–75), and secure (R. 76–92), many of these very details. But, as this Court stated in *Hagner* v. *United States,* 285 U. S. 427, at p. 431:

> * * * *The true test of the sufficiency of an indictment is not whether it could have been made more definite and certain,* but whether it contains the elements of the offense intended to be charged, "and sufficiently apprises the defendant of what he must be prepared to meet, and, in case any other proceedings are taken against him for a similar offense, whether the record shows with accuracy to what extent he may plead a former acquittal or conviction." *Cochrane and Sayre* v. *United States,* 157 U. S. 206, 290; *Rosen* v. *United States,* 161 U. S. 29, 34. [Italics supplied.]

Count 2 meets this test.

V

THE DISTRICT COURT PROPERLY OVERRULED PETITIONERS' MOTION FOR A NEW TRIAL BASED ON THE ALLEGED EXCLUSION FROM THE PETIT JURY PANEL OF WOMEN NOT MEMBERS OF THE LEAGUE OF WOMEN VOTERS

Petitioners contend[1] that reversible error resulted from the overruling of their motion for a new trial based on the ground that all the names of women in the box from which the petit jurors were selected were presented to the clerk of the district court by the Illinois League of Women Voters. Petitioners assert that they were deprived of a trial by a fair and impartial jury and denied due process of law because: (1) all the women whose names were presented by the League attended jury classes at which the views of the prosecution were presented; (2) the names of women otherwise qualified and eligible for jury service were deliberately excluded from the box from which the panel was selected; and (3) the court clerk and jury commissioner unlawfully delegated their statutory duty under U. S. C., Title 28, Sec. 412,[2] to the League, since

[1] Glasser Br. 23–25; Roth Br. 22–24; Kretske Br. 43–44. It does not appear that Kretske sought a new trial on this ground. The only affidavits appearing in the record which raised this question are Glasser's and Roth's (R. 1049–1057).

[2] This section provides: "All such jurors, grand and petit, including those summoned during the session of the court, shall be publicly drawn from a box containing, at the time of each drawing, the names of not less than three hundred

the names of all the women placed in the box were presented to them by the League. We submit that these contentions are without merit.

The facts of record substantiate neither the premise that all the women's names were presented by the League, nor the premise that any of them had the "views of the prosecution" presented to them. The record merely contains notations that the motion for new trial, made orally, apparently, on March 8, 1940, was argued on April 22 and continued to April 23 for disposition (R. 102); and that on April 23 the court denied the motion and granted leave to petitioners Glasser and Roth to file certain affidavits (R. 103). It is upon the allegations in two of these affidavits that petitioners' present contentions are based (R. 1049–1057).

What evidence or argument the Government adduced to counter these two affidavits does not ap-

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persons, possessing the qualifications prescribed in the section last preceding, which names shall have been placed therein by the clerk of such court, or a duly qualified deputy clerk, and a commissioner, to be appointed by the judge thereof, or by the judge senior in commission in districts having more than one judge, which commissioner shall be a citizen of good standing, residing in the district in which such court is held, and a well-known member of the principal political party in the district in which the court is held opposing that to which the clerk, or a duly qualified deputy clerk then acting, may belong, the clerk, or a duly qualified deputy clerk, and said commissioner each to place one name in said box alternately, without reference to party affiliations until the whole number required shall be placed therein."

pear from the record.[3] In these circumstances it is not improper to assume that the ruling of the district court was based upon the conclusion that the allegations in the two affidavits, founded solely upon an article in the American Bar Association

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[3] Petitioners' assertion (Glasser Br. 24–25; Roth Br. 23) that since the United States Attorney neither filed a counter affidavit nor a formal denial, the allegations of the affidavits for the purposes of the motion must be deemed true, is an unwarranted assumption. Since the record discloses that the affidavits were filed after the argument and the court's ruling on the motion (R. 103), presumably to make them part of the record, the Government need not have filed counter affidavits or a formal denial of the petitioners' affidavits. But, in any event, the mere omission of a counter affidavit or a formal denial does not operate as a concession of the truth of the allegations of the affidavit. The three cases cited by petitioners in support of their position are *Neal* v. *Delaware*, 103 U. S. 370, 395–396; *Ogden* v. *United States*, 112 Fed. 523, 525–527; and *United States* v. *Chares*, 40 Fed. 820, 823. The *Neal* case is clearly distinguishable on its facts. Not only did the state fail to file a counter affidavit or a formal denial, but it also made no objection to the allegations of the affidavit at the hearing. Further, the court found an implied stipulation by the state that it was willing to risk determination upon the case made by the defendants' affidavit in connection with any facts of which the court would take judicial notice. See also the dissenting opinions of Chief Justice Waite and Justice Field. The *Ogden* case involved a situation where the allegations of the affidavit were wholly uncontradicted. In the case at bar the petitioners merely specify that their affidavits were uncontradicted by a counter affidavit or a formal denial. They make no claim that the allegations of the affidavit were not contested at the hearing on the motion for a new trial. The *Chares* case fails to illuminate the problem. That case merely held that it was error for the trial court to overrule a plea which was merely defective in form. It is quite

Journal (R. 1050–1057),[4] were without merit and contrary to fact in the instant case.[5]

Even assuming that only the names of League members were placed in the container from which the jury was drawn, and that it constituted a technical irregularity, nevertheless, in the absence of a showing of prejudice, the petitioners have no cause for complaint.[6] *Hyde* v. *United States,* 225 U. S. 347, 374; *Walker* v. *United States,* 93 F. (2d) 383, 391 (C. C. A. 8), certiorari denied, 303 U. S. 644; *Agnew* v. *United*

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sufficient merely to contest the verity of the affidavit at the hearing. Cf. *Breese* v. *United States*, 203 Fed. 824, 827 (C. C. A. 4). The petitioners have not disclosed by their bill of exceptions what transpired at the hearing on their motion for a new trial. There is nothing, therefore, to exhibit the factual situation presented to the court or the premises upon which the court predicated its decision. There is no showing that the Government did not deny the allegations of the affidavits at the hearing.

[4] "*Woman and the Law*," Vol. 26, No. 4—April 1940.

[5] In fact, the allegations in the affidavit are not supported by the article. Thus the affidavits claim that only League members were summoned for jury service, yet the article discloses that at least one nonmember was summoned (R. 1052). The petitioners allege (R. 1050; Glasser Br. 26; Roth, Br. 22) that the League members attended jury classes where they were "presented with the views of the prosecution," yet the article asserts only that "all the information we had had been given us by members of the Bar Association and distinguished judges" (R. 1053).

[6] Clearly this situation is not related to the problem of systematic and arbitrary exclusion of persons in the selection of a jury. *Wuichet* v. *United States*, 8 F. (2d) 561, 563 (C. C. A. 6).

States, 165 U. S. 36, 44; *United States* v. *Parker,* 103 F. (2d) 857, 859 (C. C. A. 3), certiorari denied, 307 U. S. 642; *Brookman* v. *United States,* 8 F. (2d) 803, 806 (C. C. A. 8). The petitioners have failed to sustain the burden of showing that they were denied a substantial right. *Shuman* v. *United States,* 16 F. (2d) 457 (C. C. A. 5); *Armstrong* v. *United States,* 16 F. (2d) 62 (C. C. A. 9), certiorari denied, 273 U. S. 766. The alleged exclusion of qualified women other than League members constitutes, at most, "an irregularity without implication of injury." *Wuichet* v. *United States,* 8 F. (2d) 561, 563 (C. C. A. 6). It is possible that if the names of other qualified women jurors had been in the box, the personnel of the jury might have been differently constituted, but from this neither injury nor prejudice can be inferred. *Hyde* v. *United States,* 225 U. S. 347.

Petitioners further urge that the court clerk and jury commissioner unlawfully delegated their statutory duty under U. S. C., Title 28, Sec. 412, to the League. But the statute governing the drawing of jurors restricts the court clerk and jury commissioner by only two specific limitations. They are required to place in the box only the names of qualified persons, and they must put at least three hundred such names therein. Of course, no organization or group may dictate what names

may be placed in the box.[7] There is, however, reposed in the court clerk and jury commissioner broad discretion in the fulfillment of their duties. The law is established that as long as they do not abdicate their functions, they are permitted to exercise a reasonable degree of selectivity in determining the names placed in the box. They may properly predicate their action upon advice and information obtained from appropriate sources. *Walker* v. *United States,* 93 F. (2d) 383, 390–391 (C. C. A. 8), certiorari denied, 303 U. S. 644; *Wilson* v. *United States,* 104 F. (2d) 81, 82 (C. C. A. 5), certiorari denied, 308 U. S. 574; *United States* v. *McClure,* 4 F. Supp. 668, 671 (E. D. Pa.). The clerk's and jury commissioner's method of selection was not a delegation, but only a discharge of their duty; they did not attempt to authorize anyone to execute their duty. The law does not contemplate that they must act on personal knowledge of the qualifications of prospective jurors. The manner of obtaining information is for them to determine. *Walker* v. *United States, supra,* at 391; *United States* v. *Shannabarger,* 19 F. Supp. 975 (W. D. Mo.), reversed on other grounds, 99 F. (2d) 957 (C. C. A. 8); *Cartello* v. *United States,* 93 F. (2d) 412 (C. C. A. 8).

[7] In the affidavits filed by petitioners Glasser and Roth there was nothing to show that the League attempted to dictate that only the names of those selected by them should go into the box from which the jury was selected (R. 1047–1051).

Finally, petitioners first raised their objections to the composition of the jury list on a motion for a new trial. The disposition of such a motion rests in the sound discretion of the trial judge (*United States* v. *Holt,* 108 F. (2d) 365 (C. C. A. 7), certiorari denied, 309 U. S. 672, rehearing denied 309 U. S. 698; *Sanchez* v. *United States,* 108 F. (2d) 735 (C. C. A. 5), certiorari denied 309 U. S. 679; *Smith* v. *United States,* 106 F. (2d) 726 (C. C. A. 4)) and his denial of the motion will not be reversed except upon a showing of a clear abuse of discretion. *United States* v. *Hartenfeld,* 113 F. (2d) 359 (C. C. A. 7), certiorari denied, 311 U. S. 647; *United States* v. *Dressler,* 112 F. (2d) 972 (C. C. A. 7). Petitioners have made no such showing here.

VI

PETITIONER GLASSER WAS NOT DEPRIVED OF EFFECTIVE ASSISTANCE OF COUNSEL

Petitioner Glasser contends (Br. 31–37) that he was deprived by the trial court of his right to the effective assistance of counsel because one of his attorneys, William Stewart, was assigned by the trial court to represent petitioner Kretske.[1]

[1] Petitioner Roth also urges that Glasser was deprived of the right to effective assistance of counsel and adopts Glasser's argument (Br. 66–67). Roth has no standing to raise this point. He was represented throughout the trial by his own attorney (R. 96, 186), and thus could hardly have been affected by any alleged lack of effective representation of Glasser.

The record discloses this contention to be without basis.

On November 1, 1939, George Callaghan entered the appearance of Glasser and himself as attorneys for Glasser (R. 41). On November 2 "Harrington & McDonnell" entered their appearance, as well as that of Kretske, as attorneys for Kretske (*ibid*). Thereafter Callaghan and Harrington represented Glasser and Kretske, respectively, at the hearings on the motion to quash and the demurrers of petitioners Glasser and Kretske (R. 48–54, 58–59, 151).[2] On January 29, 1940, following the denial of the last of the preliminary motions preceding trial, each of the defendants pleaded not guilty and the cause was set for trial on February 5 (R. 95). On the same day Stewart entered his appearance as "associate attorney" for Glasser (*ibid.*).

Harrington stated on January 29 that he was engaged in the trial of a case in a state court which probably would last another two or three weeks (R. 176). On February 3 Harrington advised the trial judge that he was still engaged in the state court and was told that he and Kretske would have to be ready to proceed to trial on February 5 (R. 176–177).

On February 5, a motion, signed by Harrington, was filed requesting a continuance for Kretske

[2] Petitioner Roth also filed a separate demurrer (R. 42–48) and appeared in his own behalf (R. 151).

(R. 96, 173–174). The motion, argued by McDonnell (R. 178–179), was denied that day (R. 96); McDonnell was appointed as attorney for Kretske (*ibid.*); and the cause was continued for trial to February 6 (R. 97). On that date McConnell filed a motion for a thirty-day continuance (R. 179, 183). During the arguments on February 5 and 6 on the two motions for a continuance the trial judge stated that since not only Harrington but also his colleague McDonnell had long since filed a joint appearance for Kretske and, since McDonnell was free, the judge was not disposed to grant a continuance (R. 178–180). On February 6 McDonnell announced that Kretske did not wish to be represented by him (R. 179–180). The court then asked whether Stewart would accept the appointment. Stewart stated that he had previously filed an affidavit on behalf of Glasser "pointing out some little inconsistency in the defense" (R. 180).[3] Glasser objected to the appointment of Stewart as attorney for Kretske (R. 181). The matter was then dropped and further discussion ensued between the court, Kretske, and McDonnell. The court reiterated that McDonnell's joint appearance with Harrington had been on file since early in November 1939 and that Harrington had been advised that the case would without fail go to trial on February 5

[3] The reference was to the sworn petition of Glasser, filed January 29, requesting, among other things, a separate trial (R. 167–172). This petition was denied the same day (R. 94).

and stated that in view of these circumstances McDonnell would have to stay in until Harrington was free or Kretske retained another attorney (R. 181–182). At this juncture Kretske interposed to say, "I can end this. I just spoke to Mr. Stewart and he said if your Honor wishes to appoint him I think we can accept the appointment." Neither Stewart nor Glasser objected at this point (R. 183) and the court vacated the appointment of McDonnell and appointed Stewart as attorney for Kretske (R. 97, 183).[4]

It thus clearly appears that the very premise of petitioner Glasser's argument is untenable. The record shows that the trial court did not insist that Stewart represent Kretske. On the contrary, Stewart voluntarily accepted the appointment without any objection by Glasser when it was actually made. The most that can be said is that the court originally offered the suggestion that Stewart represent Kretske. But the suggestion was at that time rejected by both Stewart and Glasser and it is clear from the record that the court then abandoned it and returned to McDonnell's acting for Kretske. The record does not, of course, disclose what was said between Stewart and Kretske just before Kretske announced that "we can accept the appointment," but in view of the fact that both Glasser and Stewart had previously objected and

[4] It is not contended here that the trial court erred in denying Harrington's and McDonnell's motions for a continuance.

that neither voiced any protest at this point, the implication is plain that the matter was discussed between them and Kretske and that Glasser consented to Stewart's appointment. Since the appointment was made with the express consent of Stewart and, at least, the tacit consent of Glasser, the latter cannot now complain that he was deprived of effective assistance of counsel by reason of any action of the trial court.[5]

Petitioner Glasser's further contention (Br. 33–35) that Stewart was embarrassed and inhibited in the conduct of his defense because Stewart also represented Kretske finds no support in the record. The assertion that Stewart failed to object on Glasser's behalf to certain testimony which was inadmissible as against him, because

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[5] *Powell* v. *Alabama*, 287 U. S. 45, and *Johnson* v. *Zerbst*, 304 U. S. 458, cited by petitioner Glasser (Br. 36), are inapposite. The question in those cases was whether the accused were denied their right to assistance of counsel. Here Glasser had counsel of his own choice, and the record shows that Stewart was ultimately appointed as attorney for Kretske at Stewart's and Kretske's suggestion and without objection from Glasser, who is himself an attorney. *People* v. *Bopp*, 279 Ill. 184; *People* v. *Rose*, 348 Ill. 214; and *People* v. *Rocco*, 209 Cal. 68, also cited by petitioner Glasser (Br. 36), likewise are not in point. Those cases, too, were concerned with the question whether the trial court, in appointing attorneys for the accused, denied the accused the right to assistance of counsel. In each case it was held that the accused has the right to be represented by counsel who has no interest adverse to his own. Here Stewart's appointment was not forced by the court but resulted from the agreement of the parties concerned.

the jury may have drawn from such objections inferences unfavorable to Glasser or Kretske, or both, is based, first, upon an unsound premise and, second, upon speculation. The testimony complained of was that of several witnesses who related statements made to them by Kretske which implicated Glasser (R. 244–245, 297, 301, 306, 542–543, 631). But the defendants in this case were charged with conspiracy and it is settled beyond controversy that testimony regarding the acts and declarations of one conspirator in furtherance of the conspiracy is admissible as substantive evidence against all the conspirators.[6]

With reference to the witness Brantman, petitioner Glasser urges that Stewart refrained from cross-examining him "apparently * * * to

[6] *Logan* v. *United States*, 144 U. S. 263; *Morrow* v. *United States*, 11 F. (2d) 256 (C. C. A. 8); *Carnahan* v. *United States*, 35 F. (2d) 96, certiorari denied, 281 U. S. 723; *Zarate* v. *United States*, 41 F. (2d) 598 (C. C. A. 5), certiorari denied, 282 U. S. 867; *Minner* v. *United States*, 57 F. (2d) 506 (C. C. A. 10); *Cendagarda* v. *United States*, 64 F. (2d) 182 (C. C. A. 10); *Barkley* v. *United States*, 66 F. (2d) 74 (C. C. A. 4); Wharton, *Criminal Evidence* (11th ed.), secs. 699, 720; Wigmore, *Evidence* (3rd ed.), sec. 1077; see also *Hitchman Coal and Coke Co.* v. *Mitchell*, 245 U. S. 229. In respect of Glasser's assertion that there was no proof connecting him with the conspiracy, it is sufficient to point out that this was a question for the jury to determine from the facts and circumstances in evidence. *United States* v. *Manton*, 107 F. (2d) 834, 839 (C. C. A. 2), certiorari denied, 309 U. S. 664; *United States* v. *Anderson*, 101 F. (2d) 325 (C. C. A. 7), certiorari denied, 307 U. S. 625; *Cruz* v. *United States*, 106 F. (2d) 828, 830 (C. C. A. 10).

avoid probable prejudice to Kretske" Br. 34). The record negates this contention. When Brantman was recalled for cross-examination Stewart summarily dismissed him, saying, "Your Honor, I asked his man to come back for cross-examination, but I don't want to cross-examine him. I don't want anything to do with him" (R. 711). And in the colloquy which occurred at the time the sentences were imposed Stewart explained his reason for not cross-examining Brantman as follows: "It was not because I was afraid I couldn't show he was lying. I was afraid he would be telling worse lies and it would be worse as far as he is concerned if my client rested on him" (R. 1062).

Thus, petitioner Glasser can point to nothing in this record covering a month-long trial (R. 179, 1045) which shows that he was prejudiced by the fact that Stewart also represented Kretske.[7]

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[7] A cursory examination of the record discloses that Stewart actively defended Glasser's interests. He repeatedly interposed objections to the prosecutor's questions and to evidence offered by the Government (see, e. g., R. 206, 209, 219, 229, 245, 249, 257, 273, 301, 303, 380, 412, 442, 445–452, 519–520, 574, 603–604, 658) and subjected the Government's witnesses to long and searching cross-examination. (See, e. g., R. 200–204, 206–208 (Workman); 212–216 (Frank L. White); 221–222 (Dowd); 232–241 (Swanson); 245–247 (Del Rocco); 276 (Dowiat); 279–280 (Rossner); 292–295 (Walker); 313–341 (Frank Hodorowicz); 346–351 (Anthony Hodorowicz; 363–364 (Donahue); 377–380, 382–383 (Sharp, alias Boguch); 390–392 (Lancaster); 473–518 (Raubunas); 534–536 (Sylvan R. White); 564–568 (Svec); 575–581 (Cole); 591–601, 602–603 (Ellis); 606–608, 610–611

VII

EXHIBITS 81A AND 113 WERE PROPERLY ADMITTED IN EVIDENCE

All of the petitioners contend that Government exhibits 81A and 113 were improperly admitted in evidence (Glasser Br. 37; Roth Br. 38; Kretske

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(Gates); 620–622 (Rankin); 637–639 (William Wroblewski); 667–673 (Aboksetes); 676–677 (Edward Wroblewski); 686–689 (Alexander Campbell); 694–697 (Farber)). Stewart was equally vigorous in the presentation of Glasser's defense. He called numerous witnesses on Glasser's behalf (see, e. g., R. 716–720 (Judge Barnes); 722 (Kaplan); 724–728 (Balaban); 737–739, 741–743 (Judge Woodward); 743–744 (Hess); 783 (Weisbrod); 890–905 (Judge Igoe)) and conducted Glasser through a long direct examination (R. 911–954). Indeed, it appears from the record that Stewart took the leading defense role at the trial. Counsel for the other defendants participated only to a very limited extent in the cross-examination of the Government's witnesses (see R. 222, 416, 437, 524, 554, 581, 583). Even the witness Alexander Campbell, who gave incriminating testimony against petitioner Roth, was cross-examined exclusively by Stewart (R. 686–689). And it was Stewart who assumed the lead in attempting to exclude Campbell's testimony (R. 678–679). The defendant Horton, who took the stand as a witness in his own behalf, was questioned on direct examination, not by Balaban, his own attorney (R. 186), but by Stewart (R. 750–762).

Finally, it is significant in appraising Glasser's contention that he was prejudiced because of Stewart's joint representation of him and Kretske, that attorney Callaghan, who filed certain trial motions and pleadings on Glasser's behalf (R. 48–54, 61–65, 141–142), was present at the trial and participated with Stewart in the conduct of Glasser's defense (R. 194–195, 399, 574, 679, 823, 829, 831, 910, 1028, 1029, 1030).

Br. 44). The trial judge, however twice informed the jury that these two exhibits were admitted only against Glasser and not against any of the other defendants (R. 533–534, 539).[1] Neither Roth nor Kretske appears to have standing to urge the point.[2]

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[1] While the trial court stated that "At some further state of the proceedings I may advise you with reference to its competency as to the other defendants * * *" (R. 534). there is nothing in the record to indicate that it was admitted against any other defendant than Glasser. Moreover, since the petitioners have not incorporated in their bill of exceptions the trial judge's charge to the jury, it must be assumed that the jury was properly instructed concerning these exhibits. Cf. *Hall* v. *United States*, 48 F. (2d) 66, 68 (C. C. A. 9); *Brown* v. *United States*, 32 F. (2d) 953, 954 (App. D. C.); *Harrod* v. *United States*, 29 F. (2d) 454, 455 (App. D. C.); *Williams* v. *United States*, 20 F. (2d) 269, 270 (App. D. C.); *Johnston* v. *United States*, 154 Fed. 445, 449 (C. C. A. 9); *Kanner* v. *United States*, 34 F. (2d) 863, 867 (C. C. A. 7).

[2] Petitioners Roth and Kretske complain of the material concerning the defendant Kaplan which was contained in the exhibits and contend that the admission of the exhibits was prejudicial to Kaplan and that this alleged error is available to them (Roth Br. 38–40; Kretske Br. 44–51). In addition, Kretske implies that the exhibits were received against Kaplan (Br. 49). But the record shows that the exhibits were admitted only as against Glasser (R. 533-534, 539). *Logan* v. *United States*, 144 U. S. 263, cited by Roth and Kretske for the proposition that error as to one defendant in a conspiracy case is error as to all, is inapposite. There it was held that certain testimony as to acts and declarations of Logan was inadmissible. This Court said: "There being other evidence tending to prove the conspiracy, and any acts of Logan in furtherance of the conspiracy being therefore admissible against all the conspira-

Exhibits 81A and 113 are reports of the Alcohol Tax Unit covering the investigations and seizures of the Western Avenue and Spring Grove stills. They detailed the information which the investigators had gathered with respect to the parts played by the prospective defendants and contained the statements of persons who had given the investigators information connecting the accused with the stills (see also R. 533, 539–540). These reports were submitted to the United States Attorney's office by the Alcohol Tax Unit (R. 451–452, 532) and involved two of the cases in which the Government alleged that the official decisions and actions of Glasser were influenced pursuant to the conspiracy charged in the indictment.

The record clearly indicates that the reports were admitted with the consent and agreement of Glasser's counsel.[3] But in any event, the re-

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tors as their acts, the admission of incompetent evidence of such acts of Logan prejudiced all the defendants and entitles them to a new trial" (p. 309). Logan, with the other convicted defendants, sued out a writ of error to this Court (p. 276). Here, however, Kaplan did not appeal his conviction (R. 1117). And since the evidence complained of was received only against Glasser, not even Kaplan could have claimed prejudicial error in its admission.

[3] Exhibit 81A, the report of the Alcohol Tax Unit on the Western Avenue still, was the first such report offered by the Government. Investigator Campbell, called as a witness for the Government, had begun to state what his investigation of the Western Avenue still had disclosed when Stewart, Glasser's counsel, objected (R. 445). Stewart argued that it was improper to permit the investigator to

ports were competent evidence against Glasser. They showed what evidence of violations was furnished to him in two of the cases involved in the conspiracy alleged in the indictment and were, therefore, directly relevant to the charge that he conspired to defraud the United States of his honest and conscientious services.[4] Cf. *Laska* v.

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testify as to information obtained from other persons during the course of his investigation (R. 446–448). The court agreed and instructed the prosecutor that he was limited in his examination of the investigators to showing what evidence of violations was furnished to Glasser by the Alcohol Tax Unit (R. 448). After further discussion it was brought out that the investigator's report contained the information gathered by him. The court remarked, "Why go any further than that?" Stewart agreed, saying, "That is what would sum it up," and, again, "Then when Mr. Glasser testifies he can explain what value the report had" (R. 449). At the conclusion of the discussion Stewart said: "I think your Honor's suggestion, his [the investigator's] report would be better evidence than anything else as to what he reported, and let him say on top of that, if he told Mr. Glasser anything more." Both the court and the prosecutor agreed with Stewart (R. 451). Exhibits 81A and 113 were not offered and admitted, however, until after further testimony of other witnesses was received (R. 529, 532). With respect to both exhibits the record shows merely that "the defendants objected" (*ibid.*). After the prosecutor had read exhibit 81A to the jury (R. 533), the attorneys for Kaplan and Roth moved that the court declare a mistrial. The motions were denied. Glasser's attorneys did not object at this point (R. 533–534). And other reports of the Alcohol Tax Unit were admitted without objections by the defendants (Exs. 160, 163, R. 708, 712; Ex. 230, R. 1034; see also Ex. 228, R. 1034).

[4] In view of the colloquy which occurred between court and counsel before the reports were introduced (see pre-

United States, 82 F. (2d) 672, 679 (C. C. A. 10). In the light of these reports the jury was better able to appraise Glasser's explanation of his conduct of the cases and of the failure of the grand jury to indict certain of the individuals named in the reports.

VIII

THE CONDUCT OF THE TRIAL JUDGE WAS NOT SUCH AS TO DEPRIVE PETITIONERS OF A FAIR TRIAL

Petitioners contend (Glasser Br. 37–54; Kretske Br. 51–71; Roth Br. 25–40) that the trial judge made remarks prejudicial to them, committed acts of advocacy, questioned petitioners in a hostile manner, and in general failed to maintain an attitude of impartiality, and that they were thereby deprived of a fair trial. From the voluminous record petitioners have selected isolated excerpts which are alleged to support this contention.

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ceding footnote), it is not unreasonable to assume that in his instructions to the jury the court properly limited their probative value to the question of notice to Glasser. *Shepard* v. *United States*, 290 U. S. 96, cited by Glasser (Br. 41), is not in point. In that case testimony of a nurse as to a declaration made to her by the deceased was offered and admitted as a dying declaration *to prove* that the deceased was murdered by her husband, the defendant. This Court held that what was said by the deceased was not admissible as a dying declaration and that the testimony was neither offered nor received for the limited purpose of showing a will to live on the part of the deceased, and accordingly reversed the judgment of conviction.

In not one of the instances cited by petitioners (Glasser Br. 42–54; Roth Br. 25–35; Kretske Br. 51–70) as examples of alleged improper statements and interrogations by the court was there objection by any of the five attorneys representing the defendants.[1] Neither *Williams* v. *United States,* 93 F. (2d) 685 (C. C. A. 9), nor *Adler* v. *United States,* 182 Fed. 464 (C. C. A. 5), cited Glasser in his brief in reply to the Government's brief in opposition (pp. 8–9), controls the issue whether failure to object precludes a defendant's claiming error. In the *Williams* case the defendants repeatedly objected to questions propounded by the court and took exceptions to adverse rulings (98 F. (2d), at 690).[2] The *Adler* case involved a similar situation. And the dictum

[1] R. 196, 230–231, 232, 241, 243, 273, 274, 294, 297, 309–310, 346, 347–348, 349, 536–537, 545, 602, 615, 625, 627–628, 644–646, 816–817, 850–851, 863, 870, 873, 877, 878, 901–903, 920–921, 941, 943, 990–991, 1000–1002, 1022–1023, 1030.

[2] It further appears that in the *Williams* case, the trial judge assumed an extraordinarily active role; his examination of the witnesses occupied about one-third of the transcript of testimony. See the *Williams* case at p. 690. Wigmore criticizes the *Williams* decision as follows:

"Here the opinion rebuking the trial court for excessive questioning, is itself excessive in its attitude of criticism; moreover, the reference to 'the immemorial limits set down for Anglo-American tribunals' shows how little the opinion is acquainted with those traditions, for a perusal of any modern English trial record would have shown that the attitude here taken in the appellate court would have nullified the proceedings in most modern English criminal trials." Wigmore, *Evidence* (3rd ed., 1940), sec. 784 n. See also section 2551, n. 6.

from the *Williams* case is against the weight of authority, which holds that in the absence of objection allegedly improper statements and questions by the trial court are not reviewable on appeal. As was said in *Troutman* v. *United States,* 100 F. (2d) 628, 634 (C. C. A. 10): "It has been repeatedly held that ordinarily alleged errors taking place during the trial of a criminal case must be called to the attention of the court and thus afford an opportunity to correct them. It was essential to the review of these questions that they be presented to the trial court in some manner." See also *Buie* v. *United States,* 76 F. (2d) 848, 849 (C. C. A. 5), certiorari denied, 296 U. S. 585, rehearing denied, 296 U. S. 662; *Mendelson* v. *United States,* 58 F. (2d) 532, 534 (App. D. C.); *Heinze* v. *United States,* 181 Fed. 322, 325 (C. C. A. 2); *Burnstein* v. *United States,* 55 F. (2d) 599 (C. C. A. 9), certiorari denied, 286 U. S. 550; *Callahan* v. *United States,* 35 F. (2d) 633, 634 (C. C. A. 10); *Cusmano* v. *United States,* 13 F. (2d) 451, 453 (C. C. A. 6), certiorari denied, 273 U. S. 773; *Baldwin* v. *United States,* 72 F. (2d) 810, 812 (C. C. A. 9), certiorari denied, 295 U. S. 761.

In any event we submit that petitioners' claims are without merit. They complain of certain questions and statements made by the court during the examination of petitioners and other witnesses. We think, however, that the incidents

viewed in their proper background will show that petitioners' assertions of prejudice are groundless, and that the trial judge's actions were directed to clarifying the record and otherwise contributing to the progress of a long and at times somewhat confused, trial. But "separate passages cut from their context and from the trial as a whole, often have an apparent importance which in fact they do not deserve * * *. * * * nothing conduces less to [insuring an impartial conduct of the trial] than an over jealous scrutiny of every word that may fall from a judge's mouth." *United States* v. *Warren*, 120 F. (2d) 211, 212 (C. C. A. 2). Accordingly, we have set out some of these incidents, relied upon by petitioners, at length in the margin.[3]

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[3] 1. After the witness Swanson had testified as to his arrest, indictment, and arraignment in the Stony Island Avenue case (R. 227–232), he stated, in response to questions by the court, "Then I never heard any more about the case," and that "we didn't pay a fine." The court then asked, "The case just dropped out of midair?" to which the witness replied, "Well, it dropped out" (R. 232). (The Stony Island Avenue case had been stricken with leave to reinstate (appendix, *infra*, pp. 105–107.)) Obviously, there was no impropriety in interrogating the witness as to the disposition of the case. Neither was the court's use of a common idiom improper.

2. Anthony Hodorowicz, testifying concerning his indictment and arraignment in the Stony Island Avenue case (R. 343, 346), stated at the conclusion of his direct examination, "I have never been called to answer that indictment." The court asked, "You were never convicted, never paid a fine, and never went to jail?" to which the witness replied, "No"

On the whole record we do not think there was any impropriety in the conduct of the trial judge. It is settled that federal judges have the right,

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(R. 346). Here again the court's questions were designed to elicit the full truth. With respect to the court's examination of Hodorowicz regarding his appearance before Judge Woodward in the Stony Island Avenue case, it is apparent that the court's questions were based upon a mistaken assumption of the nature of the appearance. Hodorowicz had testified that after he had been indicted with Dowiat and Swanson he appeared before Judge Woodward. He stated that "They called us up in front and had us give our names and we went out of court. I did not know when I left the court room when I was supposed to return. I never returned. That is the last I ever heard of that case" (R. 346). He was referring, of course, to the arraignment on the indictment. In his interrogation of the witness the court asked whether Judge Woodward, Glasser, or Roth asked him any questions and when the witness answered in the negative the court asked, "Your recollection is that there was not a complete disclosure of all the facts that connected you with that case?" The witness replied that "It was all in front of the Commissioner" (R. 348). It is true, of course, as petitioners say, that there is no presentation of evidence upon an arraignment. But we do not agree with petitioners that the court's questions were deliberately calculated to prejudice them. It seems quite apparent that the court was confused by the witness' testimony that he never heard of the case again after his appearance before Judge Woodward. Immediately after this interrogation by the court, Stewart, Glasser's counsel, brought out from the witness the facts that the appearance was merely an arraignment, that not guilty pleas were entered, that the case was set for trial, and that there was no occasion for a trial and no trial that day (R. 349). We agree that the court fell into error here but we submit it was not prejudicial. The main fact in the Stony Island Avenue case was that it was stricken from the docket with leave to reinstate and that had been brought out in

in the interest of eliciting the truth and a full disclosure of all material facts, to interrogate both parties and witnesses (*United States* v. *Gross*,

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the examination of Swanson (R. 231–232, 235–236). It is to be noted too that no objection was made to the court's questions, though it must have been apparent to counsel that the court misapprehended the nature of the defendants' appearance before Judge Woodward (R. 348). Neither was there any motion to strike out the court's examination after Stewart had brought out the facts (R. 351).

3. Morgan, chief clerk of the United States attorney's office, testified regarding the administrative procedures of the office and similar matters, and also testified concerning the contents of certain records (R. 186–196). Near the conclusion of his direct examination he stated that "From an examination of the Sidney Eckstone Grand Jury records I can tell there were twelve no-bills returned in cases in which Glasser represented the Government. Glasser presented twenty cases to the Eckstone Grand Jury." The court asked, "That is the total number of cases presented?" and the witness replied, "By Mr. Glasser." The court's next question was, "And of the twenty there were twelve No Bills?" to which the witness replied in the affirmative (R. 196). Glasser asserts that this was "rhetorical question" which was asked with an "air of disapproval" which cannot be reproduced "on the printed page" (Br. 43). It seems clear, however, that the questions were asked, not to disparage Glasser's record before that grand jury, but for the purpose of clarifying the witness's testimony. In any event, there is no basis for a claim of prejudice simply because the witness repeated his figures under questioning by the court.

4. Petitioners Roth (Br. 30–33) and Kretske (Br. 61–63) complain of the court's questioning of Edward Wroblewski regarding the circumstances under which he retained Roth. An examination of the record discloses, however, that this witness testified very fluently and had no difficulty in remembering even minor details until the prosecutor asked him, "How did you happen to hire Roth?" Wroblewski

103 F. (2d) 11, 13 (C. C. A. 7); *United States* v. *Breen*, 96 F. (2d) 782, 784 (C. C. A. 2), certiorari denied, 304 U. S. 585; *Hargrove* v. *United States*,

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then became evasive. (R. 643–644.) It was at this point that the court conducted the examination complained of (R. 644–646). Certainly this attempt to elicit the truth was not improper.

5. Glasser asserts (Br. 47–49) that the court improperly interrupted the direct examination of defense witness Judge Igoe, formerly United States Attorney and Glasser's superior. The defense had endeavored to show through Judge Igoe that Exhibit 160, the Alcohol Tax Unit's report on the investigation of the Hodorowicz gang, was discussed between Glasser and Judge Igoe, and that the latter, after reviewing it, approved Glasser's decision to prosecute some of the persons named therein for substantive offenses under the alcohol tax laws rather than for conspiracy, as recommended in the report (R. 891–892). Judge Igoe testified that he had "seen Exhibit 160 before. This was brought to my office one day with an agent named Bailey, * * * and Glasser" (R. 891). Bailey, however, had previously testified that he had a conference with Judge Igoe and Glasser in January 1938 regarding the case the Alcohol Tax Unit was developing against the Hodorowicz gang and that he discussed the case with Glasser a number of times thereafter, and that his final report was not submitted to Glasser until April 1938 (R. 706–708). It was because of this previous testimony of Bailey that the trial court interrupted the examination of Judge Igoe to suggest that it was his impression that Bailey's report was not submitted to Glasser until "some time after Mr. Glasser and Mr. Bailey had consulted with Judge Igoe" and that "the Judge ought to have a chance to study this particular report to see when it was submitted." (R. 902.) To verify this impression the court asked Bailey, who was in the courtroom, whether he had the report with him at the time of his conference with Glasser and Judge Igoe (*ibid*). Bailey replied that he did not, that he had talked to Judge Igoe only once, on January 26, 1938,

25 F. (2d) 258, 259 (C. C. A. 8); *Kettenbach* v. *United States*, 202 Fed. 377, 385 (C. C. A. 9), certiorari denied, 229 U. S. 613; Wigmore, *Evidence* (3rd ed., 1940), sec. 748, and the extent

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that the report was not completed at that time, and that it was submitted to Glasser on April 21 (R. 902–903). Judge Igoe then stated: "I don't recall it, the time he [Bailey] was there, but I did see this report finally, if there is any question about that." (R. 903.) He also testified that he was not in favor of handling the matter as a conspiracy case. (*Ibid.*) It is obvious from this review of the incident that the court was merely trying to refresh Judge Igoe's recollection and to reconcile his testimony with the earlier testimony of Bailey, a course considerably more tactful than a subsequent rebuttal of Judge Igoe's testimony would have been.

6. Objection is made to the court's statements regarding Abosketes' indictment and conviction in Wisconsin. But the record indicates that Glasser's counsel acquiesced in them, for he asked the court, "Have you the disposition [of the Abosketes indictments], your Honor?" and, after the court had replied, stated, "We will accept your Honor's credibility" (R. 1030). Furthermore, the information concerning Abosketes' previous conviction had been partially supplied in his own testimony (R. 663, 671). And in any event we do not perceive how they could have prejudiced petitioners, since they affected the credibility of Abosketes, a Government witness.

7. Petitioners also contend that the court committed prejudicial error by making certain statements while they were being cross-examined. (a) Roth complains (Br. 25–26) of the court's remarks, "Well, why don't you say so" (R. 877), "Well, just say so, then" (*ibid.*), and "He [Roth] has a lot of last answers" (R. 878). The record shows, however, that during cross-examination Roth had persisted in arguing with the prosecutor and in giving unresponsive answers; it is apparent that Roth's conduct had taxed the patience of the court (R. 862–878). Just prior to each of the statements complained of Roth had given an unresponsive or evasive answer to the question asked (R. 877, 878). With reference to the court's statement, "Mr. McGreal [one of the

of their participation in such interrogation is a matter within their sound discretion. *United States* v. *Kay*, 101 F. (2d) 270, 272 (C. C.

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prosecutors] is not cross-examining a Judge" (R. 863), it need only be said that it may have been passed in jest and that, in any event, it was nothing more than a realistic reply to Roth's counsel's statement, "I noticed when they cross-examined the Judge they did not yell" (*ibid.*). The court's statement certainly may not be distorted into a disparagement of Roth. It is to be noted, too, that the court said he had observed McGreal's method of cross-examination and found it not improper (*ibid.*). Roth's interpretation of the court's statement regarding the record on appeal in the case of *United States* v. *About 151 Acres of Land, etc.*, is incorrect. The prosecutor's question was not, as Roth states, whether, in the trial of the libel action "Glasser would be required to disclose all the evidence the Government had in the criminal case, arising out of the still seizure" (Roth Br. 27), but whether Glasser did in that case disclose the evidence the Government had as a result of the seizure (R. 870). Roth twice evaded the question before the court made the statement of which he now complains (i. e., that since Roth examined the record on appeal he knew "just as much about it as if you were present in court"). The court's statement was, of course, true. Roth's argument that the effect of this statement was to leave the impression that Glasser withheld evidence and that Roth was endeavoring to protect him is specious.

(b) Glasser points (Br. 43–44) to the court's statement that he had the right to subpoena Ritter as a witness (R. 920–921) as prejudicial error. But just prior to this Glasser had voluntarily stated that Ritter "has been in Chicago * * * and he has not testified" (R. 920), thereby implying that it was incumbent upon the Government to call Ritter. When the court advised Glasser that Ritter was subject to subpoena, Glasser replied, "He is a government witness" (*ibid.*). In the circumstances it can scarcely be maintained that the court's advice to Glasser was improper

A. 2), certiorari denied, 306 U. S. 660. The judge "is not a mere moderator of a town meeting, submitting questions to the jury for determination,

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or that it had the effect of destroying the weight of Glasser's previous testimony that he had stricken the Stony Island Avenue case from the docket at Ritter's request (R. 918–920). Even more untenable is Glasser's argument that he was entitled to a presumption that the testimony of Ritter, if produced, would have been unfavorable to the Government. We know of no such rule of law. The cases cited by Glasser (Br. 44), far from supporting his contention, are adverse authority.

Glasser complains (Br. 46) of the court's questions concerning whether, in his judgment, it would have been advisable to secure the release of certain convicted defendants in order to obtain from them testimony upon which Abosketes could have been convicted (R. 1022). This occurred during cross-examination while the prosecutor was questioning Glasser regarding his efforts to secure commutations of the sentences of the defendants (R. 1021–1022). Glasser had endeavored to show that he made strenuous efforts to secure evidence against Abosketes (R. 936–942), and the court's questions related to those efforts. Glasser's answer was that "It was the judgment of myself, Judge Igoe, and Mr. Herrick" (R. 1022). In these circumstances we do not think it can be said that the question was either improper or prejudicial. If anything, the question and Glasser's answer had the effect of simply reiterating his prior explanation of his conduct in the Abosketes matter.

Glasser's contention (Br. 52–54) that the court acted improperly in questioning him regarding his presentation of the Chrysler sedan case before Judge Barnes is likewise not well taken. That case was tried on the Alcohol Tax Unit's condensed report of the seizure of the car (R. 717; Ex. 36), (the car seizure report, exhibit 36, is to be found in exhibit 229, the file envelope in the Chrysler sedan case), but Glasser admitted on cross-examination (R. 997–999) that prior to the trial before Judge Barnes he had received three reports from the Alcohol Tax Unit implicating Leo Vitale, the

nor simply ruling on the admissibility of testimony, but one who in our jurisprudence stands charged with full responsibility. He has the same

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husband of the claimant, in the operation of as many stills. One of these was the report (dated September 2, 1936) in the Meyers farm case, in which Vitale had been sentenced to one hour on the recommendation of Glasser in July 1938, only six months before the trial of the Chrysler sedan case (R. 250–251, 915–916). It appears that Glasser had these reports, to be found in exhibit 210, in his hands at the time he was questioned about the Chrysler sedan case by the prosecutor and the court (R. 997–1000). His last statement before the court asked the questions of which he complains, was, "I had a report. I did not tell Judge Barnes a word about Leo Vitale before he disposed of this libel case because it does not belong in a libel case" (R. 1000). In his examination the court simply sought to ascertain Glasser's reasons for not bringing to Judge Barnes' attention the information he had of Leo Vitale's bootlegging activities (*ibid.*). Nor was the court's question as to whether a given set of facts made out a case for forfeiture (R. 1001–1002) a "hypothetical question based on facts utterly without foundation in the record," as Glasser asserts (Br. 53). The car was found in a garage located only a foot or two from Vitale's home, in which the still was seized, there were marks made by cans in the floor of the trunk (R. 717; Ex. 36), and investigator Dowd had previously testified that the car was used to haul sugar from a warehouse to Vitale's home, for hauling Vitale's associates, and for trailing carloads of alcohol (R. 219). Exhibit 36, the car seizure report, also states that "the car had been used, and in furtherance of a scheme to defraud the Government of the tax imposed on distilled spirits." In addition in exhibit 210 there is a report by Dowd and other investigators, dated October 30, *1937*, concerning the seizure of a still in Vitale's home earlier in that month. That report states that license plates were transferred from "a Chrysler sedan to a Plymouth coupe." It also states that "There was found in a compartment of a Chrysler sedan * * * a yellow slip of paper having thereon notations of cane sugar and yeast

opportunity that jurors have for seeing the witnesses, for noting all those matters in a trial not capable of record * * *." *Patton* v. *Texas &*

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and cans, and a list of amounts." Exhibit 210 also contains another report by Dowd and others, dated August 31, *1938*, regarding the seizure of *another* still in Vitale's home on August 21, the date the car was seized. This report states the same facts about the car as are contained in exhibit 36, and, in addition, that Vitale had been seen using the car, that sugar sacks were found in it, and that there was an odor of alcohol in the trunk. (It is true that exhibit 36, the car seizure report, does not state that any person had seen the car being used in violations of the alcohol tax laws, but it is not true, as Glasser says (Br. 52, note 15), that that report refutes Dowd's testimony that the car had been used in such violations (R. 219) and that such evidence was in his report (R. 224). Exhibit 36 is signed by investigator O'Hara and Dowd testified that his assistant seized the car (R. 222). Dowd further stated that he "wrote a report on that case," referring to the August 21, 1938, seizure (*ibid.*). It is therefore obvious that Dowd was referring, not to exhibit 36, but to the report of August 31, 1938, contained in exhibit 210.) It appears that the court had exhibit 210 at the time he asked the question of which Glasser complains, for Glasser said, "You are showing me a criminal file, and not a civil file, that is not fair" (R. 1002). It also appears that Glasser had, just before this occurred, examined the reports (R. 997–1000). Moreover, there was no objection to the court's question. In these circumstances it cannot be said that the question did not fairly state facts which were known to Glasser. Glasser's further assertion (Br. 54) that the so-called criminal file, around which the questioning of Glasser revolved, was not offered in evidence is unwarranted. The file referred to is the file in the Meyers farm case—*United States* v. *Leo Vitale et al.*—and it contains the Alcohol Tax Unit's report on that case, reports on the stills seized at Vitale's home in October 1937 and August 1938, and a report on a still seized near Lowell, Illinois, in 1935, as well as other materials. This entire file was introduced as exhibit 210 and it is on file here.

Pacific Ry. Co., 179 U. S. 658, 660. Nor is he a "mere automatic oracle of the law, but a living participant in the trial" (*Rudd* v. *United States*,

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And it was made available to Glasser during his cross-examination (R. 996–999).

8. Roth and Kretske contend that the trial court improperly limited the right of cross-examination. They complain of the court's action in sustaining the prosecutor's objections to the cross-examiner's question to the witness Swanson, "Well, he [Bailey] could get that case [in Cleveland] called, or have something to do with it?" (R. 237), and the questions to Dewes as to whether he was confined in a penitentiary or a reformatory (R. 555). These questions were manifestly improper and there is no merit in the claim that petitioners were prejudiced by the court's statements that "Mr. Bailey is not running the courts down in Cleveland" (R. 237), and that the institutions at Leavenworth, Kansas, and Milan, Michigan, where Dewes was confined prior to the trial, are "both Federal Penitentiaries" (R. 555).

Petitioners complain, too, of the court's ruling that Glasser's counsel was limited, in cross-examining rebuttal witness William Campbell, formerly United States attorney and Glasser's superior, to the scope of Campbell's direct examination. Campbell simply denied that on the day Glasser appeared before the grand jury which returned the indictment in this case he stated to Glasser that he wanted "to tell that grand jury there was nothing in your official conduct which would require grand jury investigation" (R. 1041). Glasser had previously quoted Campbell as having made that statement to him (R. 945). The ruling was in accord with the established rule of practice in the federal courts. *Wills* v. *Russell*, 100 U. S. 621, 625; *Houghton* v. *Jones*, 1 Wall. 702, 706; *Philadelphia and Trenton R. Co.* v. *Stimpson*, 14 Pet. 448, 460. And the scope and extent of cross-examination is within the discretion of the trial judge (*District of Columbia* v. *Clawans*, 300 U. S. 617, 632; *Alford* v. *United States*, 282 U. S. 687, 694; *Blitz* v. *United States*, 153 U. S. 308, 312), and not subject to review in the absence of abuse. Cf. *Rea* v. *Missouri*, 17 Wall. 532, 542.

173 Fed. 912, 914 (C. C. A. 8)), and he "has a right to aid in eliciting the truth." *Fritts* v. *United States,* 80 F. (2d) 644, 646 (C. C. A. 10). "* * * it is his duty, to see that the facts of the case are brought intelligibly to the attention of the jury, and to what extent he will intervene for this end is a matter of discretion." *New York Transportation Co.* v. *Garside,* 157 Fed. 521, 524 (C. C. A. 2); see also *Morrissey* v. *United States,* 67 F. (2d) 267 (C. C. A. 9), certiorari denied, 293 U. S. 566. He has the right and it is his duty, if he feels the need of information, to examine in the way best calculated to produce a full disclosure of all the facts. Wigmore, *Evidence* (3d ed., 1940), sec. 784.

Especially in view of the fact that petitioners made no objections to the questions and statements of which they now complain, the language in *United States* v. *Breen,* 96 F. (2d) 782, 784 (C. C. A. 2), certiorari denied, 304 U. S. 585, is particularly apt here: "All too often, it seems, appellants like these become overcritical of a trial judge after conviction and on appeal seek to try him instead of the merits or demerits of their cause."

The court below, with reference to petitioners' criticisms of the trial court, said that "we have examined every criticism made, considered them in connection with the entire record, and are satisfied that the complaints are of minor importance.

They did not affect the substantial rights of the appellants, nor prevent the jury from exercising an impartial judgment on the merits" (R. 1138). We submit that the court was correct and that petitioners' claim of reversible error should be rejected.

IX

PETITIONERS WERE NOT DEPRIVED OF A FAIR TRIAL BY REASON OF ANY PREJUDICIAL CONDUCT OF THE PROSECUTING ATTORNEY

Petitioners contend (Glasser Br. 54–72; Roth Br. 40–50; Kretske Br. 73–82) that the prosecutor was guilty of prejudicial misconduct and that as a result they were deprived of their right to a fair and impartial trial. Examination of the grounds of their complaint shows, however, that it is without merit.

1. Petitioners claim that the prosecutor propounded many leading questions and thereby assumed the role of a witness (Glasser Br. 60–63; Roth Br. 48–49; Kretske Br. 75–81). Record references of a number of instances are cited in petitioners' briefs (R. 206, 226–227, 229–231, 244–245, 289, 296, 301, 303–306, 380, 573, 589, 604, 612–613, 636, 659–660, 673, 674–675, 703).[1] In about one-half of them no objections were interposed (R. 230, 289, 296, 301, 303–306, 612–613, 636,

[1] Some of these are quoted in Kretske's brief (pp. 75–81).

673, 674–675);[2] in one an objection was sustained (R. 245). In each instance where objection was made (R. 206, 227, 229, 231, 244, 380, 573, 589, 604, 659–660, 703) the question was permissible in order to refresh the witness's recollection (R. 206, 227, 229, 231, 573, 589, 604, 659–660, 703) or to clarify his testimony (R. 244, 380, 589).[3]

The trial court is, of course, permitted a broad discretion concerning the allowance of leading questions. Appellate courts view with disfavor objections based merely upon the form of questions because so much depends upon the particular circumstances involved in each case (such as the demeanor of the witness and the tenor of the preceding questions and answers) that it is virtually impossible to appraise the propriety of each instance. Wigmore, *Evidence* (3rd ed., 1940),

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[2] In a few of the instances cited objections were made on other grounds (R. 226, 304, 306, 612, 613).

[3] In his brief (pp. 60–62) Glasser singles out the questioning of Swanson (R. 230) and argues that the prosecutor's question was the only "testimony" tending to connect him with the "fixing" of the Stony Island Avenue still case. But the record shows that the questions were propounded to refresh Swanson's recollection and that there was no objection to them (R. 230–231). Glasser's argument completely ignores the evidence that $500 was paid to Kretske to "fix" that case, that Glasser struck the case from the docket, and that the defendants were not thereafter brought to trial on the indictment (R. 229, 232, 244, 275–276, 297–298, 346).

sec. 770. In this case we think it is clear that the questioning did not exceed the limits of propriety.

2. Petitioners contend (Glasser Br. 66–69; Kretske Br. 75) that the prosecutor put specious questions and that they were prejudiced thereby. The few instances cited from this voluminous record do not support the contention.

Thus, Glasser and Kretske urge the impropriety of the prosecutor's asking the witness Workman whether Glasser ever called him to his office after he had been placed on probation (R. 209). This occurred during redirect examination after Stewart, Glasser's counsel, had elicited on cross-examination that the witness had talked to officials of the Alcohol Tax Unit. Stewart implied in his questions that these officials seemed not to be interested in any information the witness could supply about a certain still (R. 208). In these circumstances it cannot be said that the prosecutor's question was improper, and much less that it was prejudicial.

Petitioners complain, too, of the prosecutor's question to Commissioner Walker, "It does not mean that there may not be probable cause but that it was not shown to you?" (R. 289). There was no objection to the question, which was designed simply to clarify the Commissioner's statement that his record showed that he had discharged a defendant on the ground that probable cause was not shown (*ibid.*).

The questions to Judge Woodward, a defense witness, whether his knowledge of a certain case which had been tried before him and of the records of the defendants was based upon what he had heard in court (R. 739, 741), were obviously legitimate cross-examination, since Stewart had, on direct examination, interrogated the Judge concerning Glasser's conduct in the trial of that and other cases (R. 737–739). Here again there were no objections to the allegedly offensive questions (R. 739, 741).

Judge Igoe, formerly United States Attorney and Glasser's superior, testified as a witness for the defense (R. 890–905). He stated that Glasser had conferred with him regarding certain cases and that Glasser had frequently reported his actions in those cases (R. 890–895, 897–899, 903). The obvious purpose of the direct examination was to show that Glasser's actions had the approval of his superior. On cross-examination the prosecutor sought to show that Judge Igoe did not know of many of the bootleggers involved in the cases and it appears from the record that Judge Igoe was offended by the questions (R. 907–908). When the Judge said, "I am telling you I don't know him," the prosecutor stated, "That is the point. I say you don't know them, but Mr. Glasser does know them" (R. 908). The situation thus presented was a delicate one and the trial court diplomatically, we submit, intervened to

correct it. After the prosecutor had apologized to Judge Igoe the court admonished him to be careful in framing his questions (*ibid.*). In the confusion a motion by Stewart to strike the prosecutor's statement was apparently forgotten and Stewart did not renew it (*ibid.*). Petitioners claim that this statement prejudiced them. We concede that it was improper but in the light of the circumstances under which it was uttered we do not think it was of such a serious nature as to constitute reversible error. Incidents of similar character often arise in the trial of hotly contested cases such as this and though they may have little or no significance in the trial they take on an exaggerated importance when set forth in a printed record and emphasized by counsel on appeal.[4] Cf. *Goldstein* v. *United States,* 63 F. (2d) 609, 613 (C. C. A. 8).

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[4] Glasser also objects to the prosecutor's questions to Judge Igoe whether he knew that Glasser was acquainted with a man known as Sheenie Albert, and that Glasser had met Albert on Polk Street in Chicago. Stewart objected to the question on the ground that "that never happened," and the court replied that "There is testimony here in the record to that effect." After further discussion the prosecutor withdrew the question. Judge Igoe, however, asked for and was granted permission to answer, and he replied, "Of course, Glasser never told me any such thing, and you know it" (R. 909). Glasser says that by this question the prosecutor "sought to supply evidence which he had previously sought and failed to obtain" (Br. 68). But there was, as the court stated, a factual basis for the prosecutor's question, and it was therefore legitimate cross-examination. Paul Svec had

Petitioner Roth complains (Br. 44–47) of the prosecutor's questioning of the witness Dukatt regarding his and Roth's examination of some document (R. 701–702). There was no objection to the questions and, in any event, the contention that they were unfair and prejudicial is not well founded. In an attempt to ascertain the identity of the document the prosecutor handed Dukatt the report on the investigation in the case in which Dukatt was involved. Dukatt was unable to identify it as the document he and Roth examined. His last statement in this sequence was, "Well, to be honest with you, I don't just remember, I don't know if it was this size of paper or larger, I don't remember, because I really didn't pay much attention at that time" (R. 702–703). Obviously, there could have been no inference from this that the document in question was a secret report, as Roth contends.[5]

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previously testified that on two occasions in 1937 he observed Glasser drive past a barber shop on Polk Street and sound the horn of his car, and that Albert thereupon left the shop (R. 563). Glasser's statement (Br. 68) that Svec's testimony had been stricken is not correct. Only Svec's statement that Albert said, on one of the occasions referred to, "That is Red; I guess I have to go see him," was stricken (R. 563, 569).

[5] Roth's statement that he and Dukatt "called at the clerk's office to examine the indictment" (Br. 44) is based upon his own later testimony (R. 861).

Roth's further objection that the prosecutor asked him a "legal question" on cross-examination and that the purpose of the question was to raise the inference that "Glasser had

3. Petitioner Glasser urges (Br. 63–66) that there was impropriety in the prosecutor's action in reading to the jury the testimony which Joe Cole had given before the May 1938 grand jury in the Spring Grove case.[6] The argument is based upon the erroneous premise that there was other testimony by Cole, not contained in exhibit 96, the transcript from which the prosecutor read, and that this alleged additional testimony was not presented to the jury at the trial below. Glasser does not claim that the prosecutor did not read all of the testimony of Cole contained in the tran-

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failed to perform his duty" (Br. 42), beside being unavailable to him, is a distortion of the incident. Roth himself voluntarily offered the suggestion that "He [Glasser] would have a right to amend the pleading" (R. 883–884).

Equally untenable are Roth's objections (Br. 41–42) to the recross-examination on the Chrysler sedan case and to the change in cross-examiners. These were matters within the discretion of the trial court. Cf. *United States* v. *Manton*, 107 F. (2d) 834, 845 (C. C. A. 2), certiorari denied, 309 U. S. 664.

With reference to Roth's assertion that the prosecutor misinformed the court that the Chrysler sedan case was mentioned in the bill of particulars, it need only be said that a case against Leo Vitale, the husband of the claimant of the car, is listed in the bill (R. 81–82) and that the order of the court requiring the Government to file a bill of particulars stipulated that the Government's proof was not to be limited to the matters set forth in the bill if it appeared that the proof should not be so limited (R. 77).

[6] This was the third time the Spring Grove case was presented. On the two previous occasions, in August and October 1937, Glasser withdrew the case (R. 528, 530–531).

script.[7] Neither does he claim that the transcript shows that Cole was questioned as to the merits of the Spring Grove case. He evades a definite commitment on these two important facts with the statement that the "testimony by Cole therein contained and read by the prosecutor relates exclusively to his illness" (Br. 63), and attempts to show, by citations of oral testimony at the trial below (R. 576, 606, 607–608), that there was in fact other testimony by Cole which was not included in the transcript.

Exhibit 96 refutes Glasser's contention. It was identified by Morgan, chief clerk of the United States attorney's office (R. 186), as "the transcript of testimony taken before the grand jury on May 17, 1938" (R. 529).[8] The document itself shows on its face that, with the exception of the statement of investigator Sylvan R. White to the grand jury (see R. 531), which is not transcribed therein, it is a complete transcript of *all* the testimony of *all* the witnesses called before the jury in

[7] The testimony read by the prosecutor does not appear in the bill of exceptions. Prior to his reading of the testimony the prosecutor stated, "I ask leave at this time to read his [Cole's] testimony before the May 1938 Grand Jury." Following this there is the notation, "Mr. Ward: (Reading testimony of Joe Cole before the May 1938 Grand Jury)" (R. 574).

[8] Glasser asserts that the transcript was not properly authenticated as to its accuracy and completeness (Br. 63, n. 30). There was no objection on this ground at the time the prosecutor read from it or at any other time (see R. 529, 574).

the case entitled *United States* v. *Louis Kaplan et al.* (the Spring Grove case).[9]

4. Petitioners say that the prosecutor wrongfully, and with prejudicial effect, deprived Glasser of access to certain files of the United States attorney's office during a week-end recess.[10]

During cross-examination the prosecutor questioned Glasser regarding some of the cases involved in the conspiracy (R. 954–1027). After some cross-examination the prosecutor offered in open court to give Glasser access to any file he desired to examine. Glasser stated that he appreciated the offer and that he would like to take advantage of it the following day (Saturday); the court then adjourned until the following Monday. The court stated to Glasser that he might

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[9] Further, exhibit 95, the minutes of the May 1938 grand jury, shows that this case was presented on May 17, that the Alcohol Tax Unit investigator in the case was Sylvan R. White, that the witnesses who appeared were E. Simonsen, W. Blackmon, J. Fernandez, Louis Pregenzer, R. W. Nessler, Grace Hollinger, H. D. C. Bannister, A. Schmeltzer, Cecil Simms, Joe Cole, and Sylvan R. White, and that on the same date—May 17—the jury voted a no-bill as to Kaplan, Raubunas, and Dewes, and a true bill against Slesur, Cole, Rankin, Pregenzer, and Boguch (see also R. 528–529). With the exception of investigator White the testimony of all the witnesses named in exhibit 95 appears in exhibit 96. And, contrary to the implication in Glasser's brief (p. 63), the two exhibits show that the case was presented at one session on May 17.

[10] Roth and Kretske do not have any standing to raise this point.

have access to the files over the week end. (R. 979–980.)[11] On Monday Glasser informed the court that he had gone to the United States Attorney's office on Saturday morning and was refused access to the files. The prosecutor explained that Glasser came along to the office and that he suggested that Glasser get his attorney. This Glasser refused to do and the prosecutor advised him that he could not examine the files alone. Glasser did not deny that the prosecutor's explanation was accurate, and the court then stated that "They simply told you to get your lawyer, and you didn't get your lawyer, so the responsibility is not upon them. Show him the reports now." (R. 982–983.) In the circumstances, although the prosecutor seems to have taken an impolite and unfriendly position, it seems evident that these facts do not show prejudicial refusal to allow Glasser to inspect the files. The record shows, too, that he was not placed at a disadvantage in his cross-examination, for files and reports were handed to him from time to time as the prosecutor questioned him regarding various cases (see, e. g., R. 983, 996–999, 1006, 1008).[12]

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[11] This colloquy would seem to refute Glasser's assertion (Br. 55) that the files referred to had already been introduced in evidence. Glasser does not claim that he did not have access to exhibits; the record indicates the contrary (see, e. g., R. 970, 971–972, 973–978). There is nothing to show that the files the prosecutor offered to permit Glasser to examine had been introduced.

[12] It should be noted that the bill of particulars, filed December 28, 1939 (R. 77), gave Glasser ample notice of

5. Petitioners Glasser (Br. 69–72) and Roth (Br. 48) assert that the prosecutor "surreptitiously," and with prejudicial effect, caused a pre-trial statement of the witness Raubunas (Ex. 92), to be submitted to the jury. The contention is not well taken.

During his cross-examination of Raubunas, Stewart, Glasser's counsel, asked for and obtained from the prosecutor the statement in question. This statement is dated October 20, 1939 (R. 482). Shortly thereafter, Stewart received from the prosecutor another statement made by Raubunas on July 27, 1939 (R. 483; see also R. 485). In cross-examining Raubunas, Stewart read substantial portions of the July 27 statement (R. 486–490), which was admitted in evidence as defense exhibit 84 (R. 1034). Stewart also elicited from Raubunas testimony that he later signed the longer statement of October 20, but did not question him regarding its contents (R. 482, 492, 493, 513–514). On redirect examination Raubunas identified exhibit 92 as his statement of October 20 (R. 518). The October 20 statement was then offered by the Government and the defendants' objection to the

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the cases involved in the conspiracy charged in the indictment, that in the interim before trial Glasser, on his own admission, had not requested permission to examine the United States Attorney's files in any of the cases mentioned in the bill (R. 980), and that in the summer of 1939, before the indictment in this case was returned, Glasser called at the United States Attorney's office at the latter's request and that at that time Glasser and the prosecutor went over the files in some of those cases (R. 986-987).

offer was sustained (R. 712). At page 1034, there is a notation that, at the close of the defendants' case, some 35 exhibits, both Government and defense, were "offered and received in evidence." These exhibits are listed by number and the number "92" is included in the list. It is upon this latter notation that petitioners rely to support the contention that exhibit 92 was "surreptitiously" submitted to the jury.

The certificate to exhibits of the clerk of the district court states that he received from the United States attorney "the following exhibits which were introduced in the case * * *" (R. 1075).[13] Exhibit 92 is not included in the list (see R. 1080).

The court below, referring to the notation that a number of exhibits, including exhibit 92, were introduced without objection at the close of the defendants' case and to the fact that the clerk's certificate to exhibits did not include exhibit 92, concluded that "From the record thus appearing we are unable to say that these exhibits [92 and 115] were sent to the jury" (R. 1132). In view of the ambiguity of the record, we think the court below was correct. Certainly this serious charge of misconduct on the part of the prosecutor may not be supported on so tenuous a showing as that made by petitioners.

But even assuming that, because of inadvertence, exhibit 92 went to the jury, petitioners are in no

[13] This statement is preceded by the statement, to which Glasser refers (Br. 70), that "I herewith transmit * * * certain original exhibits * * *" (R. 1075).

better position. Stewart, not the prosecutor, injected the matter into the trial. It was an act of courtesy on the part of the prosecutor to give Stewart the pre-trial statements of a Government witness. Stewart used the statements as a means of attacking the credibility of Raubunas (R. 486–493, 513–514), but offered only the first (Ex. 84) in evidence. In these circumstances petitioners have little standing to complain if Raubunas' second statement (Ex. 92) did in fact reach the jury.[14]

Moreover, in his questioning of Raubunas regarding the two statements, Stewart clearly conveyed to the jury the impression that the second one corresponded with Raubunas' testimony on direct examination, while he showed that Raubunas' first statement did not contain some of the facts to which he testified (R. 490, 492–493, 513–514). Raubunas' first statement, was sent to the jury as defense exhibit 84. Thus, even if exhibit 92, which, it is conceded, is merely corroborative of Raubunas' testimony, did go to the jury it would hardly have prejudiced petitioners.[15]

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[14] Indeed, it appears that at one point the court ruled that, in the circumstances, exhibit 92 was admissible, and that Stewart tacitly agreed (R. 519–520).

[15] What we have said regarding Raubunas' written statements applies alike to the two statements of the witness Dewes (Exs. 114, 115). The situations are almost parallel and we therefore do not think it necessary to discuss the latter (see R. 551, 552–554). Petitioner Glasser's ingenious argument (Br. 70–71) that the Government is "on the horns of a dilemma" regarding exhibits 92 and 115 is beside the point. Glasser does not mention Dewes' first statement (Ex. 114) which, the record shows, was admitted as a defense

6. Petitioner Glasser asserts (Br. 55–57) that the Government was responsible for the loss of certain of his exhibits.[16]

It is clear, and Glasser concedes, that the prosecutor took the exhibits after the trial with the consent at least of petitioner Roth (see R. 1094, 1096). And, apparently, there was no objection either at the time or thereafter to the prosecutor's retaining the exhibits.[17] Further, the United States Attor-

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exhibit (R. 551). Dewes' second statement (Ex. 115) was offered by the Government but the defendants' objection to its admission was sustained (R. 712). Here again there is an ambiguity in the record, for the clerk's certificate to exhibits lists exhibit 115, as well as exhibit 114 (R. 1081–1082). It does not otherwise appear that exhibit 115 was actually received. Thus, as the court below said (R. 1132), it cannot be determined upon the entries in the record that exhibit 115 was sent to the jury. In passing it may be noted that with respect to this exhibit petitioners do not charge any misconduct on the part of the prosecutor.

[16] While Glasser says that four such exhibits were lost his contention of prejudice in the court below and here is confined to exhibits 205 and 206. The first was a memorandum from Glasser to his superior entitled "Memorandum for Mr. Campbell concerning No-Bills Returned," and the second a copy of a letter from Glasser to former United States Attorney Igoe, apparently reporting the disposition of a case (R. 952).

[17] It is to be noted that in their petition in the circuit court of appeals for an order on the United States Attorney to produce missing exhibits petitioners alleged that on July 31, 1940, assistant United States attorney McGreal advised the clerk of that court that he was waiting to receive copies of certain exhibits which he had requested from Glasser (R. 1095). Glasser's assertion (Br. 57) that this "tends to confirm that [McGreal] had earlier discovered his loss of the originals of these exhibits" is wholly unwarranted.

ney's additional answer to petitioners' petition in the circuit court of appeals to require him to produce certain allegedly missing exhibits (R. 1094–1095) states that exhibits 182, 198, 205, 206, and 208 were defense exhibits "which did not come into the possession of the United States attorney at the time of the trial or thereafter and are not now in possession of the United States attorney or any of his assistants", and that the original stenographic transcript of the testimony did not show that exhibits 205, 206, and 208 "were offered and received in evidence, although this notation is made in the Bill of Exceptions heretofore filed" (R. 1100–1101; compare R. 952, 953). Glasser can point to nothing in the record which disproves these statements of the United States attorney. It is thus apparent that the mere fact that some of his exhibits were missing hardly supports the contention that it was the fault of the Government.

7. Petitioner Glasser contends (Br. 57–60) that a post-trial notation appearing on exhibit 130 prejudiced his appeal.[18]

The exhibit is an ordinary file envelope. At the top appears the full caption of the case of *United States* v. *Louis Caplan* (sic) *et al.* Beneath the caption there is the notation, "Indictment filed May 19, 1939," which, of course, was entered sev-

[18] This contention relates, of course, not to the issue whether Glasser had a fair trial, but rather to the issue whether he had a fair hearing on appeal.

eral months before the indictment in the case at bar was returned (see R. 2). The notations referred to by Glasser, the first of which is dated April 30, 1940, appear next. The verdict of the jury in the instant case was rendered on March 8, 1940 (R. 101, 1045), and Glasser and the other defendants were sentenced on April 23 (R. 104–105, 1059–1060). Thus, the notation of which Glasser complains—"4-30-1940—Caplan—Pleads Guilty—14 months to run concurrently with 31825 [the instant case; R. 38] * * *"—did not appear on the envelope at the time the sentences were pronounced. Glasser connects that notation with his remark to the trial court before he was sentenced ("Nobody was ever indicted and convicted that I no-billed" (R. 1064)) and argues that the prosecutor entered the notation with a deliberate purpose to prejudice him before the circuit court of appeals and that he was so prejudiced.

The argument is specious. It is a reflection upon the intelligence and judicial integrity of the court below. The court could not have failed to notice that the notation (which, in any event, reflected a fact of public record) was entered long after the close of the trial.[19] Moreover, it was brought out by oral testimony at the trial that the

[19] We concede that it was not proper for the prosecutor to enter official notations on a document which was in evidence. But we do not think that this supports petitioner Glasser's accusation of a deliberate purpose to distort the record in order to prejudice his appeal.

Spring Grove case was presented anew after Glasser had resigned and that this presentation resulted in the indictment of Kaplan, Raubunas, and Dewes, as well as the reindictment of the other defendants named in exhibit 130 (R. 489, 517–518, 550, 571–574, 713–714, 820).[20]

CONCLUSION

Petitioners had a fair trial and the convictions of petitioners Glasser and Roth were supported by the evidence. For these and the other reasons stated the judgment of the court below should be affirmed.

Respectfully submitted.

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OCTOBER 1941.

[20] Curiously, Glasser points to the very notation which he complains prejudiced him in the court below to support a thinly veiled implication that Government witnesses Raubunas and Dewes perjured themselves (Br. 60, n. 23).

APPENDIX

THE EVIDENCE RELATING TO THE SPECIFIC CASES AND INCIDENTS

The Hodorowicz brothers cases

The 119th Street still.—This still was operated by Elmer Swanson and Christ Del Rocco, two members of the Hodorowicz ring (R. 225, 242). Victor Joppek attended the still (R. 228, 247). A fire in October 1936, led to its discovery and seizure (R. 239, 249). Swanson testified that Joppek was picked up and taken to the United States Attorney's office and that Swanson talked to Joppek upon the latter's release (R. 228). Swanson and Del Rocco then consulted Horton, one of the defendants below. Horton told them that he had heard at the Federal Building that they were in trouble, that they were going to be arrested and indicted unless they did something about it, and that for $500 he would "take care" of the case. Del Rocco paid Horton that sum and Horton said he would take it down town and give it to "the boss." The boss, he said, was "Red."[1] (R. 225-227, 228, 239, 242-243.) In February 1937 special investigators Goddard and Smallwood of the Alcohol Tax Unit took Joppek to the United States

[1] It is undisputed that "Red" refers to Glasser (R. 230, 297, 301, 1123).

Attorney's office where they saw Glasser and Kretske. The investigators had started to explain that Joppek was identified with the 119th Street still, when Kretske interrupted and remarked, "Yes, yes, we know all about it." Goddard told them Joppek had signed the lease for the premises and that he admitted that he had paid the rent. Glasser said they did not "arrest a man for that" and released Joppek with instructions to return a week later (R. 249–250).

Swanson, Del Rocco, and Joppek were not prosecuted in connection with this still (R. 226, 228, 243–244).

Glasser's only explanation of this case was that it was his customary practice not to prosecute the minor figures involved in violations, but rather to attempt to ascertain through them the identity of the owners of the stills (R. 932, 964–965). The record does not show that Glasser thereafter, in accordance with what he testified to be his customary practice, made any effort to determine through Joppek who were the owners of the still.

The Peter Hodorowicz-Walter Hort case.—On January 12, 1937, Peter Hodorowicz and Walter Hort were arrested immediately after making a sale of illicit alcohol to Patrick Donahue, an Alcohol Tax Unit investigator. Donahue had arranged the purchase with Peter Hodorowicz in Frank Hodorowicz' hardware store (R. 254–255, 265–266, 357–361). After preliminary hearing, the Commissioner held Peter Hodorowicz and Hort over to the district court, and they were released under bond (R. 255–257, 265–267, 287, 298–299, 338, 362–363).

Frank Hodorowicz testified that he asked one Frank Miller, a bootlegger, if he could do anything about this case. Miller investigated and reported back to Hodorowicz that he could "take care" of it for $800. Hodorowicz paid Miller and Miller told him the case would be "dragged along." (R. 307–308, 309.)

Glasser presented this case to the June 1937 grand jury and on June 24 the jury voted a true bill. On July 1, at Glasser's request, the case was withdrawn and passed to the next grand jury. Glasser never presented the case to any later grand jury and, consequently, Peter Hodorowicz and Hort were never prosecuted for this violation. (R. 257, 267, 365, 705.)

Glasser testified that he withdrew this case from the grand jury, after it had voted a true bill, at the request of investigator Smallwood, who, he said, told him that the Alcohol Tax Unit wanted to use the case as part of a larger case against the whole Hodorowicz crowd (R. 948–949). Smallwood had died prior to the trial below (R. 958). Ritter, the investigator in charge of the agents at the local Alcohol Tax Unit office and the official with whom Glasser himself testified he had most of his contacts (R. 918), was not called.

The Walter Hort case.—Later in January 1937 Walter Hort was arrested while driving a car which contained illicit alcohol (R. 267–268). Frank Hodorowicz testified that after Hort's arrest he again consulted Miller and paid him $500 to "take care" of this case (R. 308–309). On

January 28 the matter came before the Commissioner on a petition to suppress evidence (R. 287). Kretske appeared for the Government, and Hort was discharged (R. 268, 287, 309–310).[2] Frank Hodorowicz testified that he did not know, and Miller did not tell him, how Miller accomplished the results he promised in the Peter Hodorowicz-Hort and Hort cases (R. 310).[3]

Glasser did not advert to this case in his testimony.

The Zarrattini case.—Albina Zarrattini was apprehended in April or May 1937 with illicit alcohol in her possession. Frank Hodorowicz testified that she asked him if he could "take care" of the case.[4] Hodorowicz consulted Kretske, who told him "we" might be able to take care of it. Later Kretske told Hodorowicz it would cost $600. Hodorowicz collected that amount from Zarrattini and returned to Kretske's office. Kretske told Hodorowicz he had talked to "Red", that Zarrattini had seen "Red" and he had offered her probation but she would not accept it, that Zarrattini talked too much, and that therefore, he, Kretske, could not take care of the

[2] The record does not disclose what evidence was adduced at the Commission's hearing.

[3] Miller disappeared before the trial of this case (R. 337).

[4] When he was first questioned regarding this matter, Hodorowicz said he "guessed" Albina Zarrattini came to him after her arrest and that he talked to Kretske about her case, but could not remember his conversation with Kretske (R. 296). The prosecutor returned to this subject later in his examination of Hodorowicz (R. 304).

case. Hodorowicz then returned the money to Zarrattini. (R. 304–307.)

Glasser testified that he did not remember Zarrattini or her case and denied that he ever said she "talked too much" (R. 950, 957). On cross-examination he said he "may have had a talk with her in this building where she wanted probation", but he could not recall it. When shown the file in the Zarrattini case he acknowledged that it was marked closed (R. 1008).[5]

The Clem Dowiat case.—On June 29, 1937, while hauling illicit alcohol, Clem Dowiat, a nephew of the Hodorowicz brothers, was arrested by investigators Annis and Kral of the Alcohol Tax Unit (R. 269, 355). The investigators had observed Dowiat pick up the cans in a garage where a still was later discovered and had followed him (R. 355–356). Annis discussed the case with Glasser on June 30, the day after the arrest (R. 356).

The case came before the Commissioner on July 9; Glasser appeared for the Government. Dowiat waived preliminary examination and was held over to the district court (R. 287, 356). Glasser presented this case to the grand jury on October 6, 1937. Annis appeared before the jury and testified regarding his surveillance and arrest of Dowiat (R. 356–357). Though it was a clear violation, the grand jury returned a no-bill (R. 705; Ex. 94). Glasser never discussed the case with Annis after the latter's appearance before the grand jury (R. 357).

Glasser offered no explanation of this case.

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[5] Exhibit 211A (R. 1008), the file in the Zarrattini case, shows that she was found not guilty on an indictment returned in September 1937.

The 118th Place still.—On September 1, 1937, investigators of the Alcohol Tax Unit seized a still in a garage at 124 East 118th Place. The investigators had gone to the vicinity to execute a search warrant for the premises at 128 East 118th Place; upon their arrival they detected the odor of alcohol and fermenting mash emanating from the garage at number 124 and upon investigation saw a number of five-gallon cans in the garage. Although without a search warrant for number 124, one of the investigators rapped on the door of the garage, identified himself, and tried to force an entrance. As he did so, Peter Hodorowicz and Clem Dowiat attempted to escape through a rear door but were apprehended. One John Wroblewski was also arrested at number 124. After the arrests the investigators found a still under the garage. (R. 258, 270–271, 277–278, 281, 282.)

On September 2 a complaint was issued against Hodorowicz and Dowiat and on the same day they were arraigned before the Commissioner, pleaded not guilty, and were released under bonds arranged by Frank Hodorowicz. The matter was set for hearing before the Commissioner on September 9, but was continued first to September 13 by agreement and then to September 23 upon motion of the Government. (R. 258–259, 270–271, 278, 285–286.)

Frank Hodorowicz had retained Henry Balaban to represent Peter Hodorowicz and Dowiat (R. 260, 727–728), and Balaban prepared a petition to suppress the evidence on the ground that it had been obtained by unlawful search and seizure (R. 727–728). Glasser knew of the petition for he

testified that "it was entered and continued over to the next day or some future day" (R. 949–950).

In the meantime Frank Hodorowicz had asked Kretske what he "could do about the case." Hodorowicz testified that Kretske said he would "look into it" and that thereafter Kretske told him he could "take care" of it, that it would cost $800, and that "we will have to do it in a hurry." The night before the Commissioner's hearing Hodorowicz paid Kretske $800. Kretske said he had to deliver the money to "Red" and Hodorowicz drove with him to the north side and waited while Kretske went into a building.[6] When Kretske returned to the car he said, "Everything is taken care of for tomorrow morning." On their return from the north side Kretske told Frank Hodorowicz to tell his brother Peter and Dowiat to claim ownership of the still. Frank Hodorowicz relayed this instruction to them. (R. 260, 296–297, 317–318.)

On September 23rd the Commissioner heard evidence on the petition to suppress, Balaban appearing for the defendants and Glasser for the Government (R. 285–286). The Alcohol Tax Unit investigators testified regarding the circumstances of the seizure and arrests (R. 278, 281, 282). Peter Hodorowicz testified that he owned the still (R. 262). The Commissioner took the matter under advisement and on September 24 sustained the petition.[7] The defendants were accordingly dismissed (R. 278–279, 286).

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[6] In response to a question by the court, Frank Hodorowicz said he knew that Kretske was referring to Glasser (R. 297).

[7] Frank Hodorowicz testified at the trial below that he went with Kretske to the north side on the night of Septem-

With respect to this case Glasser testified that the investigators had no search warrant for 124 East 118th Place, that he resisted the petition to suppress the evidence, and that the Commissioner sustained the petition "as he should have done" (R. 949–950, 958–959). He also testified that he did not meet Kretske in regard to this case, that he had no knowledge of any deal between Kretske and Frank Hodorowicz, and that he did not receive $800 from Kretske (R. 950, 960).*

The Stony Island Avenue still.—In the fall of 1937 Thomas Bailey and other investigators of the Alcohol Tax Unit were specially assigned to conduct a comprehensive investigation of the Hodorowicz gang (R. 384, 387–388, 390–391, 706). For several weeks in November and December these in-

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ber 23, and that Peter Hodorowicz and Dowiat were discharged by the Commissioner the next morning (R. 297). It would seem, however, that he was confused about the date and that he saw Kretske the night *before* the Commissioner's hearing, for he testified that on this occasion Kretske told him to tell Peter and Dowiat to claim ownership of the still, and that if this were done "we will have it discharged from the Commissioner" (R. 297, 317–318). Obviously, if the Commissioner's hearing had already been held there would have been no occasion for the instruction to claim ownership.

* While it affirmatively appears in this case that because the investigators had no search warrant the dismissal had a wholly innocent explanation, still there was evidence from which the jury could have inferred that Glasser, through Kretske and Frank Hodorowicz, gave instructions to Peter Hodorowicz and Dowiat to claim ownership of the still at the Commissioner's hearing to support their petition to suppress the evidence, and that in this way he colluded with Hodorowicz and Dowiat to defeat any possibility of a successful prosecution.

vestigators had under surveillance the premises 6949 Stony Island Avenue. They detected the odor of alcohol emanating from the premises and frequently saw Swanson, Dowiat, Joppek, and Anthony Hodorowicz enter and leave (R. 384–385, 387–388). On December 31 the investigators raided the premises with a search warrant and found a still and a large quantity of alcohol (R. 384, 706). Nobody was in the building at the time, but Anthony Hodorowicz and Dowiat were arrested on the street near the premises (R. 389). Swanson was also apprehended on the street but escaped (R. 386).

Anthony Hodorowicz, Dowiat, and Swanson were arraigned before the Commissioner on January 3 and 5, 1938, pleaded not guilty, and were released under bonds.[9] The matter was set for preliminary hearing on January 26 (R. 287–288).

Shortly after the seizure of the still Frank Hodorowicz arranged a meeting with Kretske at Hodorowicz' hardware store in order to "take care" of the case. Frank, Mike, and Anthony Hodorowicz, Swanson, Del Rocco, Horton, and Kretske were present. Kretske told the group there was a "lot of heat" on the case, but that for $1,200 he would take care of it. This price was agreed upon, and $500 was paid to Kretske at the meeting, the balance to be paid later.[10] Kretske assured them that the $1,200 would take care of "everything" and that nobody "would go to jail."

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[9] Swanson had in the meantime arranged for a bail bond and surrendered (R. 227, 386).

[10] Swanson and Frank Hodorowicz testified that the $500 was paid to Kretske at the meeting at Frank's store (R. 229). Del Rocco testified, however, that it was paid later in Kretske's office (R. 244).

He said "Red" or "Dan" was to get part of the money. (R. 229–231, 244–245, 297–300.)

Thereafter Frank and Anthony Hodorowicz, Swanson, Del Rocco, and Dowiat went to Kretske's office to arrange for a lawyer to represent Anthony Hodorowicz, Swanson, and Dowiat. Kretske complained again that the "heat" was on and wanted more money. He then sent Swanson, Dowiat, and Anthony Hodorowicz to petitioner Roth's office. (R. 230, 244–245, 272–273, 297, 300, 344–345.)

Prior to January 26, 1938, the date set for the Commissioner's hearing, investigator Bailey asked Glasser to have the case continued because the Alcohol Tax Unit had under-cover men working in town and did not want their identity disclosed (R. 706). On January 26, upon Glasser's motion and over the objection of Roth the Commissioner continued the hearing to February 16 (R. 234–235, 288, 345–346, 834–835). In the interim Glasser presented the case to the grand jury and an indictment was returned against Anthony Hodorowicz, Swanson, and Dowiat (R. 288, 835, Ex. 55).

Anthony Hodorowicz, Swanson, and Dowiat, represented by Roth, were arraigned upon the indictment in March, pleaded not guilty, and the case was set for trial on May 5. On the latter date they appeared with Roth ready for trial, but found that the case had been stricken from the call with leave to reinstate. Roth had received no prior notice of this. The defendants were not thereafter tried on this indictment. (R. 231–232, 275–276, 346, 835–837; Ex. 226, R. 1034.)

None of the Hodorowicz crowd paid Roth for his services (R. 230, 310, 351). Del Rocco testified

that part of the money paid to Kretske was to "take care of another lawyer * * * to represent" the defendants (R. 244–245). Kretske testified that he received a "fee of $200 or $250" from Frank Hodorowicz and that he split this with Roth (R. 805). Roth stated that he received a fee of $100 from Kretske (R. 868).

Glasser testified that he approved the complaint in this case and instituted the prosecution. He stated that on January 26, 1938, the date set for the Commissioner's hearing, Ritter, the investigator in charge of the local Alcohol Tax Unit agents, requested him to secure a continuance because the Alcohol Tax Unit did not feel it had enough evidence to win the case but would get it. Thereafter Ritter and Glasser discussed the case and at Ritter's request, and because Ritter was so "friendly" and "conscientious," Glasser presented the case to the grand jury. Glasser stated that before the date set for trial he complained to Ritter that the Alcohol Tax Unit had not produced the promised evidence, and that, upon Ritter's suggestion, he struck the case from the call (R. 918–920). Ritter was not called as a witness. (R. 920-921.) Bailey, who was working on the Hodorowicz investigation throughout the period the Stony Island still case was pending, testified that he requested Glasser to secure a continuance of that case before the Commissioner, not because of lack of evidence, but because the Alcohol Tax Unit wanted to keep secret the identity of some of its agents who were working on the investigation (R. 706). In April, Bailey submitted a comprehensive report covering the entire investigation,

which included the data on the Stony Island Avenue still, thus obviating the need for further secrecy (*infra,* p. 110). Although clearly at this point neither reason assigned for non-prosecution continued to be valid, Glasser took no further action (see *infra,* pp. 110–111; 116–117).

The investigation of the Hodorowicz group.— During a period of several months beginning in November 1937, the Alcohol Tax Unit investigators worked to develop a case or cases designed to clean up the Hodorowicz crowd (R. 384–385, 387–391, 705–708).

Investigator Bailey testified that on January 26, 1938, he discussed with Glasser the Alcohol Tax Unit's investigation of the Hodorowiczes. Bailey outlined to Glasser a conspiracy case which he was developing which involved the Hodorowicz brothers and a number of others. He told Glasser that the investigators had connected the Hodorowiczes with a number of other stills in Chicago and East Chicago and with a large "drop" where 750 gallons of illicit alcohol had been seized, and that, in addition, under-cover agents had made two purchases involving Frank, Mike, and Peter Hodorowicz. Glasser then took Bailey to the office of then United States Attorney Igoe and told Igoe that Bailey had evidence involving the Hodorowiczes in a number of violations and had "quite a case" against them. Igoe expressed gratification because, he said, he had been after the Hodorowiczes for some time, and instructed Glasser to notify him when he had the case ready for the grand jury. Glasser told Bailey that if Bailey had the report ready he would present

the case to the ~~ground~~ grand jury about February 18. (R. 706–707.)

Thereafter, throughout February and March 1938, Bailey had many discussions with Glasser regarding the Hodorowicz cases (R. 707). On March 21, during one of their discussions of the investigation, Glasser remarked to Bailey, "You have a good case against those Hodorowicz brothers, they will get five years" (R. 707–708).

On April 21, 1938, Bailey submitted a lengthy final report to Glasser, naming the Hodorowicz brothers, Swanson, Del Rocco, Dowiat, Hort, Joppek, and a number of others as prospective defendants (R. 708; Exs. 160, 163, R. 712). Though prepared and presented as a conspiracy case report (R. 708), it covered the entire investigation of the Hodorowicz gang, including the investigation of the Stony Island Avenue still, and contained evidence of substantive offenses against the persons named (R. 384–385, 387–388, 392, 705–707, 1005, 1007; Exs. 160, 163, R. 712; see also Ex. 37). At the time Glasser received the report from Bailey, he said he would present the case to the grand jury the following month (R. 708).

Frank Hodorowicz testified that in May Kretske told him that Frank was in a "jam" and was going to be indicted, but that if he paid Kretske $1,000 there would be no indictment. Hodorowicz refused to pay Kretske (R. 300; see also R. 262).

During May, Bailey discussed his report with Glasser many times. On May 9 Glasser told Bailey he would present, later in the month, the two "purchase cases" set out in the report. Bailey testi-

fied that on that occasion he asked Glasser to set aside three evenings to go over the report with him. Glasser said he would but never did. On May 31 Glasser advised Bailey that he was going to present the purchase cases and would present the conspiracy case later. (R. 708.)

Glasser presented the purchase cases and on June 3, 1938, the grand jury returned two indictments, one against Frank, Mike, and Peter Hodorowicz and Dowiat, and the other against Frank and Peter Hodorowicz and Dowiat (R. 708–709). These indictments charged two sales of illicit alcohol in December 1937 (R. 709).

Later in June Glasser told Bailey he would present the conspiracy case to the grand jury the following month. He did not do so (R. 708–709).

After the indictments in the purchase cases were returned, Frank Hodorowicz asked Kretske what he could do. He paid Kretske $250 and asked Kretske to "take care of it" (R. 311). Hodorowicz testified that he did not go to Kretske to retain him but rather to find out whether Kretske could "fix it up" and "take care that we did not go to jail" (R. 301, 311). When he later returned to Kretske's office Kretske told him that nothing could be done, that there was too much heat on him, that there was a report in Glasser's office, and that "they got Glasser over a barrel, he can't do anything," because Bailey was "in from Washington" (R. 300–301). After seeing Kretske, Hodorowicz went to Roth. Hodorowicz stated that Kretske and Roth "talked it over" and that they, with one of his brothers, went to Glasser's office

to look at "the papers" (R. 333). Some time later Roth told Hodorowicz that he had seen Glasser, that nothing could be done, and that Hodorowicz had better get a lawyer and prepare to defend himself (*ibid.*). Hodorowicz denied that he paid Roth $100 for his services and said that the only money he paid to Roth was $50 for his assistance in substituting some of the securities posted as bond (R. 333–334).

Hodorowicz apparently was not satisfied with Kretske's statements that nothing could be done; he testified that he again went to Glasser's office. He complained to Glasser that he was getting a "raw deal." Glasser said he could not "help it", that Bailey was watching the case and pressing him, that Hodorowicz had to go to jail, and that "Bailey says he will get my job if I don't put you away" (R. 302, 304). Glasser offered to show the Alcohol Tax Unit's report to Mike Hodorowicz and Frank Hodorowicz later sent Mike to Glasser's office (*ibid.*).[11]

Bailey testified that on July 12, the date set for the arraignment of the defendants on the June 3 indictments, he saw Frank Hodorowicz in Glasser's office and heard Hodorowicz ask, "How did you like the case of whiskey I sent you?" Glasser replied that it was gone long ago; that he had given "most of it away" (R. 709).

Roth represented the defendants upon the arraignment (R. 302, 709) but Frank Hodorowicz thereafter dispensed with his services (R. 302). Hodorowicz testified that he then consulted Glasser about an attorney to defend him, that he

[11] Frank could not read well (R. 321).

mentioned the names of three attorneys, including Edward Hess, and that Glasser advised him that Hess could do him "a lot of good" (R. 302–303). Glasser also told Hodorowicz that Bailey was pressing him and that this was not an ordinary case (R. 304). Thereafter Frank retained Hess (R. 311, 334).

In September 1938 Bailey again discussed the Hodorowicz matter with Glasser and asked him to present the conspiracy case to the grand jury because he had information that the Hodorowicz brothers were still violating the law. Glasser said that he could present the conspiracy case the following month and advised Bailey that the two purchase cases were set for trial on October 3 (R. 710). Glasser never presented the conspiracy case (R. 709, 1007).

The purchase cases were continued successively at Glasser's request (R. 710) and were finally brought to trial on February 1, 1939, with Glasser representing the Government and Hess the defendants. In the first case the court directed verdicts in favor of Frank and Peter Hodorowicz at the close of the Government's case, and Mike Hodorowicz and Dowiat were convicted. In the second case Frank and Peter Hodorowicz and Dowiat were convicted. Sentences were imposed on March 20, 1939 (R. 710–711). At that time Glasser did not give the court the history of the defendants (R. 711). Hess requested probation, but the court replied that this was "not a case for probation." Bailey testified that Glasser "had nothing to say" (R. 711). Frank

Hodorowicz was sentenced to imprisonment for a year and a day and Mike and Peter Hodorowicz and Dowiat for nine months (R. 711).[12]

Roth testified that Kretske referred the Hodorowiczes to him (R. 835, 861). He stated that he consulted Glasser to find out "what his attitude was with reference to the Hodorowiczes" (R. 858) and quoted Glasser as saying that he "would not recommend anything but a substantial penitentiary sentence for the Hodorowiczes" (*ibid.*). He volunteered that during one of his conversations with Frank Hodorowicz he told him that he "thought it advisable to have two lawyers," because, he stated, he "thought one lawyer should represent the three and a separate representative for Frank Hodorowicz" (R. 859). He "did a little work in connection with * * * substituting" securities on Hodorowicz' bond and prepared the substitution papers, but, he said, Hodorowicz "did not come back" (*ibid.*).

Kretske testified that Frank Hodorowicz asked him to "get some help from Mr. Glasser" and that he refused and told Hodorowicz the only thing he could do was to "go to court and battle it out the best way you can" (R. 799). He denied that Hodorowicz gave him any money (*ibid.*).

On direct examination Glasser testified that the report "was discussed between me and the agent and my superior" and that later on he "did use

[12] The same day, March 20, Glasser ceased to handle the alcohol tax call (R. 705). His resignation was requested in a letter from the new United States Attorney, Campbell, dated March 17 (R. 912). Igoe had been appointed to the bench in November 1938 (R. 905–906).

part of that report in making a presentation to the grand jury" (R. 927). He admitted that after the indictments were returned against Frank, Mike, and Peter Hodorowicz and Dowiat, Frank Hodorowicz came to his office at least three times.

On the first occasion Hodorowicz offered to plead guilty, but, Glasser said, he told Hodorowicz he would "recommend only five years * * * because that is the maximum under the statute" (R. 928). He stated that after Hodorowicz protested that there was no evidence against him, he read some, at least, of the report to Hodorowicz; that thereafter, at Frank Hodorowicz' request, Frank and Mike Hodorowicz came to his office, and that he "read the report to" them [13] (R. 928–929). Glasser said that on the occasion of Frank Hodorowicz' first visit to his office, Hodorowicz also asked him to recommend an attorney, that he refused to do so, that Hodorowicz asked him about Edward Hess and how Hess "stood with" Judge Woodward, and that he replied that Hess was "a very good lawyer" and that Hess "stood fine with" the judge (R. 929–930). Also on this occasion, Glasser said, Hodorowicz told him he would "spend ten thousand dollars to get out of this". Glasser stated that he replied, "Frank, if you spent ten million dollars, it wouldn't do you any good, you are going to the penitentiary this time" (R. 929).

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[13] Glasser testified that he read the report because his superior had told him that the "prosecution of defendants is not a baseball game, there is nothing secret about it," and that "as far as I am concerned, I don't think there is anything wrong with it" (R. 929).

Concerning Frank Hodorowicz' third visit to his office, Glasser quoted Hodorowicz as saying that Bailey had been out to see him and that Bailey had said to Hodorowicz, "What is the idea? That damned Glasser must be sore at you, we want you only to get three years and he wants you to get five years, what is the matter? Is he trying to get some money from you?" (R. 930; see also R. 1017).

Glasser also testified that "somebody" sent him a case of whiskey at Christmas 1937 but that "at that time" he did not know who was the donor (R. 950–951).

On cross-examination Glasser stated that he "was out to get the Hodorowiczes" and that he told his superior, Judge Igoe, that "the Hodorowiczes were the biggest operators in town" (R. 1004). In explanation of his failure to present the conspiracy case to the grand jury he stated that "it would take a considerable length of time to try the conspiracy * * *; it is simply a catch-all" (R. 1004), and that he was under instructions not to present the conspiracy case (R. 1007). He admitted that he had Bailey's report in his possession from April 1938 (R. 1005), that it was "probably true" that the report contained evidence of additional substantive offenses committed by Anthony and Pete Hodorowicz, Swanson, Del Rocco, Dowiat, and other members of the Hodorowicz "mob" (R. 1007), and that the evidence with respect to the Stony Island Avenue case, which he had stricken from the call, was included in Bailey's final report of the Hodorowicz investigation (R. 1005). He also stated that

"All the time when I was dealing with Colonel Bailey on the Hodorowicz case he was coming to me and giving me facts regarding the violation of the Alcohol Tax laws that Hodorowicz and the crowd were supposed to be committing" (R. 1016). None of these other substantive offenses was presented to the grand jury (see R. 1005–1007) and Glasser offered no explanation of this. He did not deny Bailey's testimony that he repeatedly, even as late as September 28, 1938, more than two months after the indictments on the "purchase" cases had been returned, stated to Bailey that he would present the conspiracy case.

Judge Igoe, called as a witness on behalf of petitioners Glasser and Kretske, testified that he discussed the Hodorowicz matter with Glasser and Bailey, that thereafter Glasser reported that he was working up a "substantive case" and that his instructions to Glasser were to develop the substantive cases if there was evidence of violation of the alcohol tax laws and to present the conspiracy case "if he saw fit" (R. 891–892). Judge Igoe also stated that he did not favor prosecuting on the conspiracy charge (R. 903). He relied upon his assistants to keep him "advised about cases from time to time" (R. 907).

The Kaplan and associates cases

The Western Avenue and Spring Grove stills.— In September 1935 Kaplan solicited Victor Raubunas to invest money in the business of manufacturing illicit alcohol (R. 452). Kaplan assured Raubunas that he had "protection" through people in the Federal Building and that there would be no trouble (R. 453). Raubunas testified that he

gave Kaplan $1,000 for his share in the business and that Kaplan, Raubunas and Adam Widzes established an illicit distillery at South Western Avenue in Chicago (R. 453–454, 473).[14] Raubunas,

[14] Raubunas testified to the following story which, we concede, has elements of incredibility: When Raubunas frequently complained to Kaplan about the lack of profits, Kaplan explained that he was paying $430 a week for protection, $400 to "big people" in the Federal Building, and $30 to the police, and assured Raubunas that they would make money from the still (R. 454, 475). The "big people," Raubunas testified, were identified by Kaplan as "Red" and Kretske (R. 475, 500). Raubunas testified that he doubted that Kaplan was paying over this money and so he determined to find out who the "big people" in the Federal Building were. In February and March 1936 he frequented the courtrooms in the building until he learned the names and faces of petitioners Glasser and Kretske (R. 455–456, 475, 500).

In March Kaplan took Raubunas to the Great Northern Hotel in downtown Chicago and instructed Raubunas to wait in the lobby. Raubunas testified that he saw Kaplan meet and converse with Kretske and that thereafter, as he and Kaplan were leaving, Kaplan told him that Kretske, then still an assistant United States attorney, was a "big man" (R. 456, 500). Later, according to Raubunas, Raubunas heard Kaplan arrange by telephone to meet somebody at Kedzie Street and Douglas Boulevard. Raubunas, suspicious, followed Kaplan to see if Kaplan was in fact paying protection to federal officials. He testified that from a delicatessen store at the intersection of Kedzie and Douglas, he saw Glasser and Kretske approach in a light green car. Kaplan got in the car and drove off with them. In a short time the car returned, Kaplan got out, and Glasser and Kretske left (R. 457, 476). Raubunas saw the same thing occur in May (R. 458, 477). Glasser, Kretske, and Kaplan each denied that they had ever ridden in a car together (R. 722, 799, 960, 967). Kretske and Kaplan denied that they had met at the Great Northern Hotel (R. 722, 809).

Widzes, and Ralph Boguch erected the still (R. 368, 454, 473) and after operations were commenced in October 1935 (R. 475) Boguch was employed to attend the still and deliver alcohol (R. 366, 372).

In July 1936 the Western Avenue still was raided by special investigator Campbell and other agents of the Alcohol Tax Unit (R. 367, 445, 458, 478). None of the principals was present at the time (R. 372, 377, 459). Raubunas testified that in August Kaplan told him and Widzes that they were in trouble and that for $500 apiece he could "squash" the case. Kaplan was well informed regarding the activities of the Alcohol Tax Unit agents for he told Raubunas that Campbell was investigating the case, that Campbell might arrest Raubunas, but that after the case was submitted to the "building" it was out of the investigator's hands. Raubunas paid Kaplan $500. (R. 458–460.)

Raubunas testified that in December 1936 Kaplan told him that investigator Campbell was looking for him and that if he was arrested to say nothing (R. 463). On December 24 Campbell picked up Raubunas and took him to Glasser's office. Campbell asked that Raubunas be placed under bond, but, Raubunas testified, Glasser released him and told him to return after Christmas. Raubunas then went to Kaplan and threatened to talk but Kaplan told him, "If you squawk it is your own funeral, you know we meet people in the federal building who take care of that." Following Kaplan's advice, Raubunas did not return to Glasser's office. (R. 463–465.)

In October 1936, a few months after the Western Avenue still had been raided, Kaplan, Raubunas, Edward Dewes, and Stanley Slesur started a new still at Spring Grove (R. 460–461, 537, 626). Among others involved in this still were Joseph Cole (R. 462), Louis Pregenzer (R. 582–583), Ralph Boguch and Louis Rankin (R. 367–368, 619–620).[18]

This still was raided on January 19, 1937, by agents of the Alcohol Tax Unit, and Boguch and Rankin were arrested on the premises (R. 367, 465, 508, 529, 538, 620). They were arraigned before United States Commissioner Walker in Chicago, waived preliminary examination, and were released under bonds provided by the defendant Horton (R. 368, 379, 620, 621, 622). Horton told them Kaplan wanted to see them and they thereafter met Kaplan, Raubunas, and Slesur. Kaplan told Boguch and Rankin that "everything will be taken care of, that they would postpone the case until it got dusty, and would forget about it, drop it." (R. 369, 620).

In February 1937 and thereafter, Boguch, worried about his arrest at the still, asked Kaplan many times about the case. Boguch

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[18] In connection with this still, Raubunas testified that Kaplan again promised that the new still would be "protected" through "big people" in the Federal Building and that this protection would cost them $350 a week (R. 461, 478, 505, 538). He told Raubunas he was to meet these people and make arrangements for the protection (R. 461–462, 477). Raubunas testified that he followed Kaplan and again saw him meet Glasser and Kretske in a car at the corner of Douglas Boulevard and Kedzie. Thereafter Kaplan told Raubunas that everything was "all right" (R. 462, 477).

testified that Kaplan assured him that he need not worry, that he would not have to go to court and that the case was "on the shelf" (R. 371, 372–373). Raubunas testified that Kaplan told him they were in trouble and that it would take $500 apiece to "squash" the case. Raubunas paid Kaplan that amount and Kaplan told him to forget the case, that he, Kaplan, had people in the Federal Building "taking care" of it, that they had no trouble in the Western Avenue still case and would have none in this (R. 465–466).[16]

In July 1937 the reports of Campbell and White in the Western Avenue and Spring Grove cases, respectively, were submitted to Glasser (R. 451–452, 529; Ex. 81A, R. 533; Ex. 113, R. 532). Each report contained statements of witnesses (R. 533, 539–540; Exs. 81A, 113). The report on the Western Avenue still (Ex. 81A) was concerned with the activities of Kaplan, Raubunas, Widzes, and others, and the Spring Grove case report (Ex. 113) named Kaplan, Raubunas, Dewes, Slesur, Cole, Pregenzer, Rankin, Boguch, and others as the persons implicated (R. 539–540).

Both Campbell and White testified that they discussed the cases and their respective reports with Glasser on numerous occasions (R. 451–452, 529–530).[17] Glasser presented the Spring Grove

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[16] Again in this case Kaplan was well informed regarding the progress of the investigation for in March or April he told Raubunas that investigator White was working on the case, that Cole and Pregenzer had "squawked," but that when White finished his job and turned the case over to the "building" he was through (R. 466).

[17] White testified that during one conference on the Spring Grove case with Glasser and then United States Attorney

case to the grand jury on August 11, 1937 (R. 528, 530). White testified that he outlined the case to the jury and wrote the names of the prospective defendants on a blackboard in the order of their importance (Kaplan, Raubunas, Dewes, Slesur, Cole, Pregenzer, Boguch, Rankin, Joe Fernandez, and Cecil Simms). He stated that Cole, Simms, and Fernandez had indicated a willingness to testify and recommended that they be used as government witnesses (R. 530). Only Cole and one Robert Nessler were called as witnesses before the jury (R. 528, 530).[18] Cole was called twice on August 11. After his second appearance, Glasser told White he thought Cole was crazy, that Cole had made a clear statement on his first appearance but that when he was recalled, he contradicted himself (R. 530–531). Glasser then withdrew the case from the jury (R. 528, 531).

Glasser presented both the Western Avenue and Spring Grove cases to the grand jury on October 7, 1937. The only witness called in the Western Avenue case were James Brown and Edward Jawor.

Igoe, Glasser said that he had heard Kaplan was a notorious bootlegger, that it appeared from White's report there was sufficient evidence to secure an indictment and conviction, and that this was the type of case he liked to see brought in (R. 530).

[18] White had previously given Glasser the name of Peter Frett as a witness to be called. Frett had subleased the still premises to the persons who installed the still and White had obtained from him an affidavit which implicated Kaplan and which corresponded in part with Cole's affidavit (R. 532, 536–537; Ex. 113, R. 532). Glasser had a copy of this affidavit (R. 536). The day the case was presented Glasser showed White a letter from Frett stating that he was in Pennsylvania and would be unable to appear (R. 532).

On the same day the grand jury voted a no-bill as to Kaplan, Raubunas, Widzes and Boguch (R. 528; Ex. 94).

With respect to the presentation of the Spring Grove case White testified that he again outlined the case and gave the jury the names of the prospective defendants as he had done in August. No other witnesses were called and at Glasser's request this case was again withdrawn (R. 528, 531; Ex. 94). On this occasion, Glasser did not inform White why he had taken this action (R. 531).

On May 15, 1938, two days before Glasser presented the Spring Grove case to the grand jury for the third time (R. 528–529), the defendant Horton called Dewes and advised him that Kretske wanted to see him. Dewes went with Horton to Kretske's law office.[19] Dewes testified that Kretske told him that the grand jury was meeting and that if he could raise $100 he would not be indicted in the Spring Grove case. On May 17, in Horton's presence, Dewes paid Kretske $100. Kretske told Dewes he would send the money "over to the redhead in the federal building" and that Dewes would be "no-billed" by the grand jury. (R. 542–543.)

The same day Glasser again presented the Spring Grove case to the grand jury. White again reported the case and listed the names of the defendants for the jury. Pregenzer was called as a witness but refused to sign a waiver of immunity and did not testify. Two of the persons who testi-

[19] Kretske had resigned as assistant United States attorney in April 1937 (R. 187, 801).

fied were witnesses against Cole and Pregenzer. Peter Frett [20] was not called; Cole was called but was in the jury room for only a few minutes. (R. 531–532; see also R. 528–529; Ex. 96, R. 529.) White testified that he could not understand this because he had obtained a five-page statement from Cole (R. 531). E. L. Gates, the foreman of the May 1938 grand jury (R. 603), and Charles G. Ellis, the secretary (R. 588), testified that the presentation of the Spring Grove case was hurried (R. 588, 604). Ellis testified that before Cole was called in Glasser told the jury that it would not be necessary to consider his testimony because most of it would relate to Cole's illness. The jury was led to believe that Cole was mentally unbalanced, and in his examination of Cole, Glasser questioned him only regarding his illness (R. 590; see also R. 571–572; Ex. 96), although Cole was a key witness (R. 530, 531; see also R. 569–570; Ex. 113, R. 532). Ellis testified that Cole appeared to be perfectly normal (R. 599). Glasser had White's report in the case with him in the grand jury room but did not give it to the jury for examination (R. 602). Ellis stated that "the case was brought out with the inference that certain men were the officials of the brewery, so to speak, or distillery, and others were more or less just small fry. The testimony was given to us in more or less of a rapid-fire manner" (R. 588).

On May 17, 1938, the grand jury voted a true bill against Cole, Pregenzer, Rankin, Boguch, and Slesur, and a no-bill as to Kaplan, Raubunas, and Dewes (R. 528–529). Thus, of the four partners in the still (Kaplan, Raubunas, Dewes, and

[20] See *supra*, footnote 18, p. 122.

Slesur), only Slesur was indicted. Yet Ellis testified that to the best of the grand jurors' knowledge the men who were indicted were the owners of the still (R. 591) and, further, that Glasser advised the jury who should be indicted (R. 589). Because of Glasser's position and knowledge of the case, the jurors accepted his counsel (*ibid.*). On June 1, an indictment was returned against the true bill voted on May 17 (R. 529).

On or about May 17, Pregenzer, who had refused to testify before the grand jury, met Kaplan and asked him what he was going to do about Pregenzer's involvement in the Spring Grove case. Pregenzer testified that Kaplan told him not to worry. Kretske joined them and told Pregenzer, "Don't worry, you have nothing to worry about, you will be all right" (R. 582). After the indictment was returned, Rankin asked Kaplan what he should do. Kaplan took Rankin to Kretske's office but Rankin did not talk to Kretske (R. 620). Raubunas testified that in June, Kretske arranged to meet him and advised him that Slesur, Cole, Rankin, and Pregenzer had been indicted. Kretske asked Raubunas for $200 to prevent "trouble" for Raubunas. Raubunas refused to pay him. (R. 472, 489.)

Cole, Pregenzer, Rankin, Boguch, and Slesur, the defendants named in the indictment returned on June 1, 1938, were not brought to trial during Glasser's tenure (see R. 372, 571–573, 582–583, 619–621, 623; Ex. 177, R. 1034).

In May 1939 Glasser's successor again presented the Spring Grove case to the grand jury.[21] Cole

[21] Glasser was relieved of the alcohol tax call in March 1939 (R. 705) and ceased active work in April (R. 912).

testified before the grand jury on this occasion (R. 573). This presentation resulted in the indictment of Kaplan, Dewes, and Raubunas, and the reindictment of Cole, Boguch, Rankin, and Pregenzer (R. 379–380, 489, 517–518, 550, 572–574, 583, 621–622, 713–714, 819–820; Ex. 130).[22] This indictment was pending at the time of the trial below (R. 380, 517–518, 550, 583, 622; Ex. 130).

Concerning the Western Avenue case Glasser stated that he presented all available evidence to the grand jury (R. 918). On cross-examination he testified that investigator Campbell's report on the case was a good one and that he thought at the time that it was a good case (R. 967). He also testified that witnesses before the grand jury identified Kaplan as the person who bought the coal which was delivered to the still premises (R. 970). Finally, he stated that he concurred in the action of the grand jury and that Kaplan should have been no-billed (*ibid.*), but offered no explanation.

Glasser explained the failure of the May 1938 grand jury to indict Kaplan, Raubunas, and

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[22] Slesur had pleaded guilty on the first Spring Grove indictment and on two other indictments on March 31, 1939, and on June 30 was sentenced to four years on each, the sentences to run concurrently with a sentence of five years which had been imposed in the southern district of Indiana on April 4 (R. 630; Exs. 172, 177, 178, 179, R. 1034). Glasser appeared when the pleas were entered but his successor represented the Government at the time the sentences were imposed (R. 630).

After Kaplan and Raubunas were summoned to appear on the May 1939 indictment, Kaplan sought out Raubunas and told him that Kaplan's "friend Glasser" had resigned and that they had to find somebody to "fix" the case (R. 713–714).

Dewes in the Spring Grove case on the ground that Cole, the principal witness, was not reliable (R. 923–925). Apparently referring to his action on the occasion of the August 1937 presentation, he stated that the case was withdrawn at investigator White's suggestion in order to enable White to obtain corroborating testimony (R. 924). White admitted that he assented, on that occasion, to the withdrawal of the case after Glasser had told him that Cole had contradicted himself before the jury and that it was advisable to secure corroborating testimony (R. 530–531, 534). In respect of the presentation to the May 1938 grand jury, Glasser testified that the jury was not satisfied that Cole was reliable, that he called Cole "at least twice, maybe three times," and that on Cole's last appearance before that jury he examined him only concerning his illness (R. 925). Glasser offered no explanation of his action in withdrawing the case from the October 1937 grand jury. The general purport of his testimony regarding this case was that there was not sufficient evidence upon which to obtain the indictment of Kaplan, Raubunas, and Dewes (R. 922–926, 965). On cross-examination he admitted that he was thoroughly familiar with White's report before the case was presented (R. 970), and testified that White was a "fine agent" (R. 965).[23]

Judge Igoe, who had been Glasser's superior (R. 890, 905–906), was called as a witness on behalf of Glasser and Kretske (R. 890). He testified that Glasser reported to him that he thought Cole was mentally unbalanced and was not a reliable

[23] See, in this connection, Point IX, 3, *supra*, pp. 87–89.

witness. Glasser also reported that the testimony of the witnesses did not support the report of the Alcohol Tax Unit and that as a result some of the accused persons would probably be no-billed (R. 893).

The Boguch removal case.—In February 1937, shortly after his arrest at the Spring Grove still, Boguch was arrested for removal to the district of Montana, where he had been indicted under the name of Ralph Sharp, alias Ralph Hoppe (R. 290–291, 369, 377). A day or two after his arrest, Boguch was released by the Commissioner under a bond provided by Horton (R. 289, 291, 369). After Boguch's release, Horton took him to a nearby tavern where they met Kaplan and Raubunas. Kaplan told Boguch he could "fix" the case for $250; that Boguch did not "have to go to Montana. We can take care of it here, we have some friends and connections". Boguch paid Kaplan the $250. (R. 370, 376–377.) Shortly thereafter the proceeding was dismissed by the Commissioner on the motion of the Government (R. 290–291, 370–371). Commissioner Walker testified that his records showed that the basis of the Government's motion to dismiss was that Boguch had been indicted in the northern district of Illinois (R. 291).[24] Though Boguch had been arrested at the Spring Grove still and was then

[24] Boguch testified that Kretske and Glasser were in the Commissioner's office the day the case was called and that Kretske said he did not think "this is the man" (R. 370–371). Boguch was represented by an attorney but he testified that he did not retain him (R. 370). Commissioner Walker testified that his record showed that assistant United States attorney Drymalski, who handled removals, appeared for the

at liberty under bond, he was not indicted until June 1, 1938 (*supra*, pp. 124–125). Aside from the notation in the Commissioner's record, it does not otherwise appear in the record here that Boguch was in fact under indictment in the northern district of Illinois in February 1937. Commissioner Walker had before him as he testified a certified copy of the indictment returned in the demanding district, but he did not testify that an indictment returned in the northern district of Illinois was presented to him at the time of the hearing. And his file (Ex. 68, R. 290) contains no such indictment. Weisbrod did not remember whether any papers were presented to the Commissioner (R. 784).

The Beisner farm still.—In October 1937 Raubunas, Widzes, Dewes, and Edward Farber established a distillery on a farm near Arlington Heights, owned by Emil Beisner (R. 468, 540–541, 689–690). This distillery was raided on November 18, 1937, and Farber, Widzes, Beisner, and one Neiss were arrested (R. 469, 484, 541, 689–690). Farber was released a day or two later under bond (R. 525, 690, 692).

Government (R. 291; Ex. 68, R. 290). Harry Weisbrod, called as a witness on behalf of petitioners Glasser and Kretske, testified that he represented Boguch on this occasion, that Drymalski appeared for the Government, and that he did not believe Kretske or Glasser were present (R. 783). Kretske was in office at the time (R. 187, 901), but he denied that he was present and said he had nothing to do with this case (R. 799). This matter was not mentioned in Glasser's testimony. The testimony of Boguch that Glasser and Kretske were present is not necessarily inconsistent with the testimony of the Commissioner and Weisbrod, and the jury could have found, despite Kretske's denial, that he and Glasser were present.

On about November 19, Farber arranged to meet Horton with Raubunas and Dewes. Bonds for the three men who were still in custody were discussed and Raubunas, Dewes, and Farber negotiated with Horton in order to "fix" the case. Horton said he could "take care" of the case for $1,200. Raubunas paid Horton $300 on account of the bonds, but they declined to do business with him on a "fix" because his price was too high. (R. 469, 507, 525, 541–542, 548.)[25]

Raubunas and Dewes both testified that after they left Horton, Farber told them he thought he knew somebody else who would fix the case for less money and the three then went to Kretske's law office (R. 470, 486, 542, 548).[26] Kretske told them he could "take care" of the case for $1,200; that "if Horton could take care of the case for $1,200, I could," but that he would not do it for less (R. 470, 542, 548). They saw Kretske again the next day and Raubunas paid him $300. Dewes, however, had been unable to raise any money (*ibid.*). Raubunas testified that Kretske told him to "forget about the case"; with your $300 * * * everything will be all right" (R. 470). Raubunas saw Kretske again a day or two later

[25] Farber testified that the $1,200 mentioned by Horton was for bonds and an attorney for the farmer Beisner and that these were the only matters with which they were concerned (R. 690–692).

[26] Raubunas had not known Kretske before, but he testified (R. 470) that Kretske was the same man he had seen with Kaplan at the Great Northern Hotel, and with Glasser on the three occasions in 1936 when Kaplan met Glasser and Kretske (*supra*, footnote 14, p. 118).

and complained that he was afraid of trouble. Kretske assured him there would be none and told him, "if you know Kaplan, you know he is having no trouble at Spring Grove" (R. 470–471). The Commissioner's preliminary hearing on the complaint against Farber, Widzes, Neiss, and Beisner had been set for November 24 (R. 290) and Raubunas asked Kretske about a lawyer to represent the defendants before the Commissioner. Kretske told Raubunas they did not need a lawyer since "Red is there" (R. 471).[27]

In October 1938 Glasser presented the case to the grand jury, and on November 1 an indictment was returned against Raubunas, Dewes, and Beisner. Farber, Widzes, and Neiss were no-billed (R. 290; Ex. 169, R. 712, 1034; Ex. 156, R. 697–698).[28] Raubunas testified that after he had sur-

[27] Later in November 1937, Horton called Raubunas and told him Kretske needed $100 more. Raubunas complained that he had already given Kretske $300, but nevertheless gave Horton the additional $100 (R. 471). In January 1938 Kretske summoned Raubunas to his office, told Raubunas that there was trouble again and that this would cost Raubunas $400. Raubunas refused to pay. (R. 471–472.)

[28] Shortly before Christmas 1937 Glasser requested Attorney A. H. Cohen, who had represented Widzes for a short time while this case was pending before the Commissioner, to come to his office. Glasser told Cohen that he had heard that Cohen had said that he had withdrawn from the case because there was a "fix." Cohen told Glasser he had not said that and Glasser asked Cohen for a statement to that effect. Glasser took Cohen to the office of Warren Canaday, the first assistant United States attorney (R. 191), and Cohen there dictated and signed the statement requested by Glasser (R. 617–618; Ex. 128).

rendered and posted bond he saw Kretske and was told that it would cost him four or five hundred dollars to get out of this "trouble." When Raubunas said he had no more money, Kretske told him to go to Anderson, a lawyer previously retained by Raubunas, "and see what he can do for you" (R. 472). Dewes testified that he also consulted Kretske after he had posted bond on the indictment and asked Kretske how much he would charge to "take care" of the case. Kretske said, "I will take $275, and you won't go to jail." Kretske also told Dewes that he would not represent Dewes but would provide a lawyer, that he "would take care of it" with his "friend, the redhead," and that Dewes would probably "get a suspended sentence, or an hour in the custody of the marshal, or probation" (R. 543). Dewes stated that in December 1938 he paid Kretske $275 to "fix" the case. Kretske told Dewes not to worry (R. 544). Referring to the Spring Grove case, Kretske told Dewes, "You didn't go to jail there. You won't go to jail on this case"; and that his "friend was the Assistant Attorney over there." Kretske also told Dewes that he had resigned as assistant United States attorney "under pressure" and that for "holding the bag" he was to receive favors from the "redhead." (R. 544–545.)

In December, at Beisner's request, Dewes introduced Beisner to Kretske. Kretske told Beisner he would "take care" of his case for the same price he had charged Dewes. Beisner agreed. (R. 545.)

On December 27, 1938, Dewes pleaded not guilty. Petitioner Roth represented him, though Dewes testified that he had not retained Roth and did not pay him (R. 546). On one occasion in 1939 Dewes was with Roth in the Federal Building and complained that he wanted "to go to bat that day, and get it through with." Roth replied that he did not want to see Dewes go to jail and that he would "call up Norty [Kretske] and see if possible to go to trial." Roth did call Kretske and asked him if it was all right to go to trial that day. At the same time Roth asked Dewes for money, but Dewes told Roth he had already paid Kretske for "the fix". Roth replied that he was not interested in what Dewes had paid Kretske and that he was "fighting the case on the merits." (R. 546.)

The case was continued and Dewes testified that he went to Kretske to find out why it was not dropped. Kretske said "the redhead" wanted more money because Dewes was still "in the business." Dewes accused Kretske of conducting a "racket," and as he was leaving Kretske admonished him, "You never paid any money to Glasser. You paid me the money. I will stand up, I will go to jail. You never dealt with him." Kretske also told Dewes that Slesur was being brought in from the penitentiary and that if Slesur talked they "would all go to jail." (R. 547.) Later, after Dewes had learned that Glasser was going to resign, he told Kretske he wanted to get his case "over with" before Glasser "was out of the building." Kretske, Dewes stated, said that the alcohol cases had been taken away from his "friend" and that he could do nothing for Dewes (*ibid.*).

In April 1939, after Glasser had resigned, his successor re-presented the Beisner farm case to the grand jury and an indictment was returned against Farber, Widzes, Neiss and one Duthorn, as well as Raubunas, Dewes, and Beisner, the defendants named in the November 1, 1938, indictment (Ex. 168, R. 712, 1034).

In respect of the Beisner farm case, Glasser testified that an Alcohol Tax Unit agent, either Ritter or Campbell, had told him that some witnesses would testify before the grand jury against some but not all of those involved. He stated that he called before the grand jury all the witnesses produced by the agent (R. 935–936). Ritter was not called in the trial and though Campbell was a witness for the Government he was not questioned regarding this matter (see R. 441–445, 451–452).

Glasser did not explain why Raubunas, Dewes, and Beisner were not brought to trial on the October 1938 indictment during his tenure in office.

Attorney Daniel Anderson, called as a witness on behalf of petitioner Glasser, testified that he represented Raubunas in this case and that because of failing health he requested several continuances of the trial during the winter of 1938–1939 and that on other occasions the trial was postponed because either Glasser or the judge was busy with the trial of another case (R. 823–824). It is undisputed, however, that Anderson's associate represented Raubunas during the preparation and trial of the case. (R. 764–765, 827; compare also Ex. 169, R. 712, 1034, the United

States Attorney's docket in the Beisner farm case, and Ex. 177, R. 1034, the docket on the first Spring Grove indictment).[39]

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[39] In addition to the cases discussed above, Farber was involved with Jack Weber and Harry Dukatt (alias Brown [R. 700]) in the Union City still (R. 689, 698, 700), which was discovered in March 1937 (R. 689). Farber, Dukatt, and another were indicted on November 1, 1938, the same day the Beisner farm indictment was returned (Ex. 157, R. 697–698). Farber and Weber pleaded guilty and were placed on probation (R. 690, 699; Ex. 157, R. 698). Dukatt, who was represented by Roth (R. 699, 700), pleaded not guilty and the case as to him was continued. On May 3, 1939, Dukatt changed his plea and was sentenced to imprisonment (R. 699; Ex. 157, R. 698).

Slesur was involved with Stanley Wasielewski and others in the Downers Grove still case (R. 623–624, 631, 632, 629–30; Exs. 172, 178, R. 712, 1034) and with Rankin and others in the Wilmington still case (R. 620–621, 623, 625; Ex. 179, R. 1034). Wasielewski testified that he was arrested at the Downers Grove still in March 1938 and was released under a bond arranged by Slesur (R. 631). Shortly after his arrest he went with Slesur to Kretske's offices. As Slesur was leaving Kretske's private office, Wasielewski heard Kretske tell Slesur that he would "take care of everything" with the "red-head" (R. 631). Slesur and Wasielewski were indicted in this case in December 1938, but were not prosecuted on the indictment during Glasser's tenure (R. 630, 633; Exs. 172, 178, R. 712, 1034). In the Wilmington case, Slesur and Rankin were indicted in December 1938 (Ex. 179, R. 1034). This indictment was pending against Rankin at the date of the trial below (R. 621). On March 31, 1939, Slesur pleaded guilty on both of these indictments, as well as the June 1938 Spring Grove indictment, and on June 30 was sentenced to the penitentiary, the sentence in each case to run concurrently with a sentence previously imposed in the southern district of Indiana (Exs. 172, 177, 178, 179, R. 712, 1034; see also R. 630).

Other Cases

The Kwiatkowski case.—On August 26, 1938, after having been observed twice entering and leaving premises for which a search warrant had been issued and in which a still was found (R. 393, 395–396, 413), Walter Kwiatkowski was arraigned before the Commissioner on a complaint which had been approved by Glasser (R. 288–289, 396, 401, 413). Kwiatkowski had been arrested with non-tax-paid alcohol on his person (R. 395). The matter was continued for hearing to August 31 and then, by agreement, to September 12 (R. 288–289). Kwiatkowski was released on August 26 under a bond provided at the request of Frank Hodorowicz, by Horton and for which Kwiatkowski paid Horton $200 (R. 288, 413, 731, 755). On August 31 Kwiatkowski, with Henry Balaban, an attorney whom he had previously retained, went to the South Chicago Savings Bank and withdrew $3,750 from his account.[30] (R. 413, 440, 724–725).

A few days later Horton told Kwiatkowski that for $600 he could "fix" the case. Kwiatkowski paid Horton the $600 and Horton said, "Don't be afraid, I'll fix it" (R. 413). A hearing was held

[30] The bank had previously refused to allow Kwiatkowski to make a withdrawal because he did not have his pass book. The book had been found by the investigators at 7915 Saginaw Avenue at the time they executed the search warrant. It was because of this that Balaban went to the bank with Kwiatkowski on August 31 (R. 396, 413, 724). Balaban testified that Frank Hodorowicz brought Kwiatkowski to his office, that Hodorowicz was also present at the bank, and that the $3,750 was turned over to Hodorowicz (R. 724–725). The latter, however, denied that he had any connection, direct or indirect, with the Kwiatkowski case (R. 329).

before the Commissioner on September 12; Glasser appeared for the Government and Balaban for the defendant (R. 289). Investigator Rossner testified concerning the circumstances of Kwiatkowski's arrest (R. 289, 397–398). On September 14 the Commissioner discharged Kwiatkowski on the ground that probable cause had not been shown (R. 289).

On November 10, 1938, Ritter, of the Alcohol Tax Unit, wrote to the United States Attorney, for the attention of Glasser, stating that additional evidence had been secured and requesting that the Kwiatkowski case be reconsidered with a view to presenting it to the grand jury (R. 585–586). Ritter enclosed a supplemental report prepared by investigator Goddard which contained statements of witnesses connecting Kwiatkowski with the still (R. 585, 586–587, Ex. 230, R. 1034). Glasser did not deny that he did not thereafter present this case to the grand jury (R. 962–963). In June 1939, Kwiatkowski was indicted (R. 430).

Glasser had no independent recollection of the Kwiatkowski case (R. 952). He stated on cross-examination that he did not receive a supplemental report prepared by investigator Goddard, that so far as he was concerned the case was closed when the Commissioner discharged the defendant, and that if a supplemental report did come into his office it was filed by his secretary and he "probably didn't even read the report" (R. 961–963).

The Abosketes matter.—Early in 1938 Frank Brown and several others had been convicted and sentenced in connection with the operation of a still in McHenry County, Illinois (R. 647, 663);

they were confined in a Chicago jail awaiting commitment (R. 649). Glasser had conducted the prosecution (R. 647). Brown wrote to investigator Bailey from the county jail stating that he wished to talk to Bailey (*ibid.*). On February 23 Bailey informed Glasser about the letter, told him that he had previously talked to Brown, that he believed Brown could give evidence connecting one Nick Abosketes with the still, and requested Glasser to have Brown brought to Glasser's office (*ibid.*). After first displaying considerable reluctance (R. 647–649), on March 10 Brown told Glasser and Bailey that he had rented the farm where the still was seized for Abosketes and that in return Abosketes promised him a share in the profits from the still (R. 649). Glasser never talked to Bailey about the Abosketes matter after that date (*ibid.*).

In the meantime, in the latter part of February, one William Brantman, a Chicago accountant who testified that he had known petitioner Kretske for many years (R. 650) called Abosketes and arranged to meet him (R. 663–664, 665). Brantman told Abosketes that he had connections in the Federal Building and had information that Abosketes was going to be indicted in the northern district of Illinois, and that for $5,000, to be paid through Brantman, to somebody in the Federal Building, the case would be "fixed" and Abosketes would not be indicted (R. 664, 665, 668, 669–670, 672). Abosketes was not convinced that he was in any danger but Brantman saw him again later in February and told him, "They have the goods on you, Mr. Glasser has got it out of Brown" (R.

665–666). Abosketes concluded that Brantman's information was authentic (R. 665–666, 669, 670, 673) and on April 19, 1938, Abosketes paid Brantman $3,000 and obtained a receipt from him, reciting that the $3,000 was received "on account of services" (R. 651, 666, 670; Ex. 134, R. 651). Brantman testified that he rendered no services to Abosketes (R. 651). Brantman delivered the $3,000 to Kretske (R. 652). Kretske told him Abosketes was to pay an additional $2,000 (R. 653) and Brantman asked Abosketes for the balance (R. 666, 670, 671).[31] A week or two after Abosketes paid the $3,000 to Brantman, Brantman met him in Milwaukee and told him that everything was "in control"—that "everything is alright." (R. 670.) Abosketes was not indicted in the northern district of Illinois (R. 663, 666).

Glasser testified that he and Bailey questioned Brown and others regarding Abosketes' connection with the still and that they could get nothing out of them (R. 939, 940–941). Referring to Bailey's testimony (R. 649), Glasser stated that Bailey never reported that Brown had said that Abosketes was connected with the still (R. 940). On cross-examination he stated he did not remember whether Brown told him and Bailey that Abosketes was connected with the still (R. 954). But he had previously testified that he made strenuous efforts to secure evidence against Abosketes (R. 936–937), even to the extent that he made a trip to Washington to attempt to get comumutations of the sentences of the convicted defendants in exchange

[31] The claimed balance was never paid (R. 671).

for their testimony against Abosketes (R. 939–940).[32]

The Paul Svec incident.—Paul Svec was associated with one Albert Yarrio (R. 557, 560–562, 776). Kretske testified that he had "known of" Yarrio for about 15 years (R. 813). Yarrio and Svec frequented a barber shop which was a general meeting place of gamblers and bootleggers (R. 562).

In June 1935 William Workman and numerous others, including Yarrio, had been indicted in connection with a large still located in a warehouse (R. 193, 194, 197, 198, 211). This was one of Glasser's first cases (R. 914, 976). Yarrio was appre-

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[32] Glasser contends (Pet. 45–46) that no incriminating inference against him can be drawn from the facts testified to by Brantman and Abosketes because Brantman first approached Abosketes before the date of Glasser's and Bailey's first interview with Brown. Bailey's testimony indicates that he and Glasser first questioned Brown in Glasser's office on February 23, 1938 (R. 647). Glasser asserts that the date of Brantman's first conversation with Abosketes was February 20 or 22. This assertion is predicated upon the statement that Abosketes' answer to the prosecutor's question, appearing at the bottom of page 663 of the printed record, concerning the date of Abosketes' meeting with Brantman, appears at the top of page 658 owing to a printing error. That answer, Glasser asserts, was, "The 20th or 22nd of February." Even if there is a printing error in the record, the premise upon which the argument is founded is unsound. Abosketes testified that he first met Brantman "in February 1938 right after the trial they had for this still in Illinois." The prosecutor then asked, "In February of 1938?" (R. 663). No answer to the question appears in the record at that point, and we will assume that the first line of page 658, which reads, "A. The 20th or 22nd of February," is Abosketes' answer. Abosketes subsequently testified that he met again Brantman in Chicago "later about 1 week * * * the last part of February" (R. 665–666). Later he stated that

hended in November 1935 and taken to Glasser's office but refused to make a statement (R. 210–211). Workman and one Young, both of whom were connected with the corporation which owned the warehouse (R. 197, 199), pleaded guilty and were placed on probation (R. 199, 215). The indictment was subsequently dismissed as to the remaining defendants, except Yarrio, either because, as explained by Glasser, there was no evidence against them, or because they were minor figures and had promised to testify for the Government (R. 914–915, 973–975, 987, 989). The last action in the case was on April 1, 1936, when the indictment was dismissed as to Yarrio and one E. L. Welch for want of prosecution (R. 194, 195). Frank White, one of the investigators who worked on the case, testified that he did not like the final disposition ~~again Brantman in Chicago "later about a week * * * the last part of February" (R. 665–666). Later he stated that,~~

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his meetings with Brantman occurred during the months of February, March, and April 1938 (R. 666). On cross-examination he stated: "Those twelve people [the persons whom Glasser and Bailey had questioned] were convicted the first part of February 1938, they were being held over here in the jail after they were convicted. It was about ten days and two weeks after they were convicted that I got a telephone call from this man Brantman to come to Chicago" (R. 668). Again on cross-examination he stated: "About thirty days or forty days or so after that [his first meetings with Brantman in February] I came to Chicago and gave Mr. Brantman my $3,000" (R. 670). Actually the money was not paid until April 19 (R. 651), approximately two months after the February meetings (Ex. 134, R. 651). It is thus apparent that Abosketes did not remember the exact dates of his meetings with Brantman. His testimony shows that he was certain only that the first two meetings occurred in the latter part of February. Indeed, the answer "The 20th or 22nd day of February" shows that Abosketes was stating only an approximate date.

of the case, but that there was nothing of which he could complain (R. 214).

Connors, an Alcohol Tax Unit investigator, testified that he saw Yarrio in Glasser's office on two occasions in 1938 and 1939 (R. 698, 699). Glasser admitted that Yarrio had been in his office but said that Yarrio was there in 1935 or 1936 in connection with the Workman case and that on those occasions Yarrio denied any connection with that still (R. 978–979). With respect to Yarrio's dismissal for want of prosecution, Glasser testified that the witnesses he was relying upon failed to identify Yarrio, that he reported this to the court, and that the court of its own motion dismissed as to Yarrio (R. 931, 983–984).

Svec testified that he, Horton, and Kretske met Yarrio in the vicinity of the barber shop in August 1937, shortly after Svec had been arrested on another alcohol charge (R. 560–562). He also testified that on two occasions later in 1937 he was in the shop with Yarrio when Glasser drove past in a green 1936 model Buick with white side wall tires and sounded the horn of his car.[33] Yarrio, he said, left the shop immediately after Glasser drove past (R. 563–564).

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[33] Robert Denk, called as a witness on behalf of Glasser, testified that in 1936 Glasser purchased a 1936 model Buick (R. 829). And on cross-examination Glasser stated that in 1936 he had "a green Buick with white side walls as Paul Stryke (*sic*) said" (R. 1015). It will be recalled that Raubunas testified that Glasser and Kretske were in a "light green car" when he saw them meet Kaplan in April 1936 (R. 457).

In October 1937 Svec was indicted for the offense for which he had been arrested in August (R. 557). He was tried in October 1938, with Glasser representing the Government and Roth the defendant. Svec was convicted and sentenced to the penitentiary (R. 557, 854).

In December 1938, while he was at liberty under an appeal bond, Svec was again arrested by investigators of the Alcohol Tax Unit (R. 557). He testified that the investigators took him that night to their office and that from there he called Glasser on the telephone. Svec's version of this conversation was that he told Glasser the investigators had told him that if Glasser consented they would release him. He denied that money was mentioned. At the end of the conversation, according to Svec, Glasser told him that if the investigators released him he would "throw them in the can" with Svec (R. 564–565).

Glasser's version of his telephone conversation with Svec was as follows: Svec said that he had offered the investigators money and told them he knew Glasser, that the investigators told him it was "okay" to call Glasser, that he did not have any money with him, and that he wanted Glasser to tell them "it's okay". Glasser testified further that he told Svec, "Why you so-and-so, I convicted you twice. If you are guilty this time, I will convict you again" (R. 932). He said that he then called the Alcohol Tax Unit's office and told the investigators to bring Svec to his office the next morning (R. 933).

The next morning Glasser arranged with the Federal Bureau of Investigation to secrete an

agent in an anteroom adjoining his office (R. 583, 933). When the investigators arrived with Svec he asked them to wait outside while he talked to Svec (R. 557–558, 933–934). The Federal Bureau of Investigation agent testified that Svec told Glasser, in response to the latter's questions, that the investigators told him to call Glasser and have him guarantee that Svec would pay money to them, that he had never seen Glasser outside the Federal Building, that he had never paid Glasser any money or received from him any promise in regard to any prosecution, and that he had never seen Glasser with Yarrio. At the conclusion of the conversation, Glasser asked Svec if he would be willing to sign a written statement and Svec agreed to do so (R. 583–584; see also R. 558–559, 934).

Svec testified that prior to his hearing before the Commissioner he talked to Roth regarding his conversation with Glasser and that Roth told him he "stood up O. K." (R. 559). He also testified that Yarrio retained Roth to represent him at the Commissioner's hearing. Svec was discharged by the Commissioner (*ibid.*).

The Vitale cases.—In October 1935 a still located on the farm of Charles Meyers in La Salle County, Illinois, was raided by the county sheriff, and Leo Vitale was arrested (R. 441; Ex. 210, report dated September 2, 1936). The Alcohol Tax Unit had previously investigated the still. Cloonan, one of the investigators, testified that the investigation disclosed that Vitale owned the still and operated it with others from August to October 1935 (R. 442). Cloonan prepared a full report of the investigation (Ex. 210, report dated September 2, 1936) and thereafter Glasser discussed the case

with Cloonan (R. 442). The case was not presented to the grand jury until the spring of 1938, when an indictment was returned against Vitale, James Simanello, and others (R. 250, 441, 442; Ex. 165, R. 712, 1034). Prior thereto the Alcohol Tax Unit had made other investigations of Vitale which involved him in the operation of other stills (R. 443; Ex. 210, reports dated November 14, 1935, and October 30, 1937). Vitale and Simanello were arraigned before Judge Wilkerson in July 1938, and Vitale pleaded guilty (R. 253; Ex. 165). Before sentence was imposed Glasser told Judge Wilkerson that Vitale was on the Meyers farm the night of the raid, that he had investigated and found that Vitale had no record, and suggested that Vitale be sentenced to one hour in the custody of the marshal. Judge Wilkerson accordingly imposed the sentence suggested by Glasser (R. 250–251; Ex. 165). Simanello was arraigned next and pleaded not guilty, but later changed his plea (R. 251, 253; Ex. 165). At the time he was brought before Judge Wilkerson for the pronouncement of sentence, the judge asked Glasser how it had happened that Vitale had received so light a sentence. Glasser replied that he did not know. (R. 253.)

In December 1938, a libel action involving one Chrysler sedan which had been seized by investigators of the Alcohol Tax Unit was tried before Judge Barnes (R. 218–219). The investigators had raided the residence of Vitale in Peru, Illinois, seized an illicit still and arrested Vitale (R. 218–219; Ex. 210, report dated August 31, 1938; Ex. 36).[34] The car was found in a garage

[34] Exhibit 36 is to be found in Exhibit 229, the file in the Chrysler sedan case.

located only about a foot behind the residence (R. 219). Investigator Dowd testified that he had investigated this still before the raid and observed that the car was used to haul sugar from a warehouse to the residence, in the transportation of Vitale and his associates, and in "tailing" carloads of alcohol to Springfield (R. 219). He also stated that he had made a report on the investigation and seizure of the still which contained evidence that the car had been used in connection with Vitale's bootlegging activities (R. 222, 224; Ex. 210, report dated August 31, 1938). In the libel action Rose Vitale, the wife of Leo, was the claimant; the car was registered in her name (R. 222). Glasser appeared for the Government and Rose was represented by petitioner Roth (R. 219), to whom she had been referred by Kretske (R. 875). The action was tried before Judge Barnes on investigator O'Hara's condensed report of the seizure of the car (R. 717; see also R. 222; Ex. 36). That report related the circumstances of the seizure, described the location of the garage, and stated that there were marks on the floor of the trunk of the car showing where the corners of cans of alcohol had cut into the wood and that the car had been used "to defraud the Government of the tax imposed on distilled spirits" (R. 717; Ex. 36). Investigator Dowd testified that at the trial of the libel action Roth stated to Judge Barnes that Vitale was "O. K.," that the car had not been used in connection with the manufacture of alcohol and that it belonged to Vitale's wife. Dowd testified further that Glasser sat silent or, at most, confirmed what Roth had stated to the court, and that

he protested to Glasser that the facts were not being fully disclosed to Judge Barnes, that the judge had not been informed of Vitale's previous conviction in the Meyers farm still case, and requested Glasser to call him to the stand. Glasser told Dowd to "get the hell out of here," and Dowd left (R. 219–220). Dowd also stated that the full report on the investigation and seizure of the still was not read to Judge Barnes (R. 222, 223). The libel was dismissed (R. 220).

Roth testified that after Glasser opened by reading O'Hara's report of the car seizure, Roth argued that the Government had not made out a case for seizure upon the opening statement, and that he therefore moved for a finding for the claimant. Judge Barnes then ordered the car returned to the claimant. (R. 838.)

Judge Barnes, called as a witness in behalf of Glasser, testified that the libel action was tried on the car seizure report, that the report was not a sufficient showing upon which to forfeit a car, and that "The car was not in the place where the still was, the car belonged to the wife, and I had no more right to take that car than I had to take yours" (R. 717–718). It clearly appears from his testimony, however, that no further proof was adduced on behalf of the Government (R. 718), and he testified on cross-examination that in libel actions he relies upon the assistant United States attorney to give him all the facts necessary to a proper decision (R. 721).

Dowd testified that he later talked to some people who had talked to Vitale after the Chrysler affair. He thereafter reported to Glasser that Vitale had bragged that "he got out of this

for nine hundred dollars," and told Glasser he had a number of witnesses to whom Vitale had talked. Dowd asked Glasser, "Let us bring him in and see who got those nine hundred dollars." Glasser said he would, but never did. (R. 221.) Glasser denied that this conversation with Dowd occurred (R. 1003).

With referennce to the Meyers farm case, Glasser testified that he recommended a sentence of one hour for Vitale for two reasons, first, because investigator Dowd told him the Alcohol Tax Unit had a better case against Vitale in Peoria and suggested to him that he recommend such a sentence, and, second, that Vitale had already been convicted and fined in the state court on a charge of operating the still, and that his instructions from his superior were that a man was to be prosecuted but once for each offense (R. 915–916). But he admitted on cross-examination that at the time Vitale was sentenced he had in his possession reports from the Alcohol Tax Unit regarding other cases it had developed against Vitale, as well as the report in the Meyers farm case, and that he did not tell Judge Wilkerson about the other cases (R. 996–999).[35] He explained that "the Judge didn't ask me to tell him about cases where the fellow has not been convicted" (R. 998). Nevertheless, Glasser also testified that "I was anxious to tell

[35] The reports referred to are to be found in exhibit 210, the file in the Meyers farm case (*United States* v. *Vitale et al.*). Prior to July 1938, when Vitale was sentenced to one hour in that case, the Alcohol Tax Unit had submitted reports dated November 14, 1935, and October 30, 1937, respectively, concerning stills seized at Lowell, Illinois, and at Vitale's home in Peru.

Judge Wilkerson the type of fellow Vitale was and I did" (R. 999).

Concerning the libel case, Glasser said he "might have" told Dowd to get out of the courtroom (R. 1001). He admitted that at the time of the trial before Judge Barnes he had the Alcohol Tax Unit's full report of the investigation of the still found in Vitale's home at the time the car was seized (R. 999–1000; see Ex. 210, report dated August 31, 1938). The latter report was not read to Judge Barnes (R. 1000). In explanation of this Glasser said (*ibid.*), "I did not tell Judge Barnes a word about Leo Vitale before he disposed of this libel case because it does not belong in a libel case," and again (R. 1002), "The criminal file is not used in connection with the civil file. I never did. It shouldn't be."

The Wroblewskis matter; the Roth-Campbell incident.—Edward and William Wroblewski [36] were indicted in the northern district of Indiana in April 1938 for conspiracy to violate the alcohol tax laws (R. 680). Alexander Campbell, an assistant United States attorney of that district, testified that Roth came to his office in Fort Wayne, Indiana, in September 1938 and inquired about the Wroblewski case. The files were not available at the time and Roth asked Campbell, if the latter found on checking the files that the

[36] The Wroblewskis had previously been arrested and questioned when William was apprehended with a quantity of illicit alcohol in his possession (R. 634, 713); Glasser had released Edward (R. 643–644), and William, after pleading guilty, had been sentenced to three months, although it appears that Glasser did not oppose his petition for probation. (See R. 634, 744–745.)

Wroblewskis had not been indicted, whether "some arrangement can be made so that they will not be indicted, isn't there some way we can handle this so it does not have to be presented to the Jury." Roth said he knew "all about grand juries * * * how they work," and offered Campbell $500 or $1,000. Campbell refused the offer and advised Roth that if the Wroblewskis were not already indicted the case would be presented to the grand jury in due course. Roth then said, "Well, that is the way we handle cases in Chicago sometimes." Campbell testified that he reported the incident the next morning to either investigator Bailey of the Alcohol Tax Unit or the Federal Bureau of Investigation (R. 681–682).

The Wroblewskis were tried on the indictment in Hammond, Indiana, in December 1938, were convicted and sentenced to imprisonment (R. 683). The convictions were appealed and they were released on appeal bonds (R. 635, 676, 683). Edward and William Wroblewski testified that they were questioned by Bailey before and after the trial (R. 635, 677). Both testified that on one occasion after the trial, after Bailey had arranged to meet them at the office of the Federal Bureau of Investigation, Edward talked to Roth and that as a result they did not keep their appointment at the Bureau (R. 635–636, 677). William told Roth on one of these occasions that "the law" was trying to get information from him. Roth advised him that if he gave any information he might implicate himself (R. 636; see R. 878).

In July 1939, after the Wroblewskis' conviction had been affirmed (*United States* v. *Wro-*

blewski, 105 F. (2d) 444 (C. C. A. 7)), Roth, this time accompanied by Kretske, again visited Campbell (R. 683). In the meantime, Edward Wroblewski had pleaded guilty to an indictment in the southern district of Indiana and was then serving the sentence of imprisonment imposed there. The sentence in the southern district was to run concurrently with that in the northern district (R. 643, 676, 684). Campbell testified that on this occasion he, Roth and Kretske discussed the matter of the two sentences running concurrently (R. 683–684). As he was leaving the office Roth told Campbell that Bailey was "conducting some sort of an investigation in Chicago" and that he did not "want to get mixed up in" it. He asked Campbell to use his influence to "pull [Bailey] off of this investigation." Campbell refused. He testified that he thereafter reported the incident to Bailey or the Federal Bureau of Investigation as he had done on the previous occasion (R. 684–685).

On August 1, 1939, Roth, again accompanied by Kretske, surrendered William Wroblewski in Hammond, Indiana, for commitment to the penitentiary (R. 635). As they left him, Kretske admonished Wroblewski, "Don't say anything" (R. 636).

Roth admitted that he went to see Campbell in Fort Wayne in September 1938 and July 1939 but denied that he offered him a bribe (R. 843, 846). His explanation of the September 1938 meeting was that he merely offered to enter a plea of guilty for the Wroblewskis if Campbell would agree to recommend a nominal sentence.

He told Campbell that his clients were poor, that he was not sure of getting a fee, and that he was therefore anxious to avoid the necessity of a trial. According to Roth, the only mention of money was his remark to Campbell, "The days of five hundred and one thousand dollar fees from bootleggers are gone". (R. 841–842.) With respect to the July 1939 meeting, Roth testified that he went to see Campbell regarding the issuance of the commitment papers upon the sentence imposed upon Edward Wroblewski in the northern district of Indiana (R. 847–849). He said he did tell Campbell on this occasion that Bailey had been questioning some of his clients and that he had heard Campbell's name mentioned in Chicago in connection with the Wroblewskis case, but denied that he asked Campbell to use his influence with Bailey to stop the investigation (R. 850, 851–852).